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In the Supreme Court of the United States

OCTOBER TERM, 1962

JAMES ALVADO AND FRANCIS M. BILBEE,
Petitioners

v.

GENERAL MOTORS CORPORATION
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on June 15, 1962.

OPINIONS BELOW

The opinion of the District Court (288a-298a) is reported at 194 F.Supp. 314. The opinion in the Court of Appeals on the first appeal (Appendix, 24) is reported at 229 F.2d 408. The opinions in the Court of Appeals on this appeal (App. 31, 37) are reported at 303 F.2d 718.

JURISDICTION

The judgment of the Court of Appeals (App. 41) was entered June 15, 1962. By an order of Mr. Justice Harlan, dated September 10, 1962, the time for filing this petition was extended to and including Setpember 29, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

General Motors adopted a vacation pay provision for the single year July 1945 - June 1946 (when the great majority of veterans returned to its employment) which, with

the knowledge of GM and to its substantial financial benefit, had a discriminatory effect against returning veterans by depriving them of virtually all vacation pay while increasing somewhat the vacation pay of non-veterans.

The question presented is whether the statute's protection of veterans against discrimination may be breached, and the employer may discriminate thus against veterans, so long as the employer's motive is its own deliberate economic advantage at the expense of the veterans, rather than a subjective mental state of hostility toward them.

STATUTE INVOLVED

The pertinent statutory language of the Selective Training and Service Act of 1940, 50 U. S. C. App. 308, is as follows:

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer, and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

. . . . . .

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

. . . . . .

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to

established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

STATEMENT

This is a class action,[1] brought in behalf of 50,000 veterans who returned to respondent's employ between July 1945 - June 1946. They seek to recover vacation pay for that year.[2]

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[1]The class of veterans to which Plaintiffs belong, and in whose behalf this action is brought, is that of the employees of defendant whose vacation pay is provided for in the 1946 collective bargaining agreement, who entered military service, who had one or more years' seniority at the end of the fiscal year ending June, 1946, so as to qualify for vacation pay under all prior agreements, who were entitled to reinstatement in July, 1945—June, 1946, under the Act, and who were employed in the last pay period in the fiscal year ending in June, 1946 (5a-6a; 229 F.2d at 409). Since discrimination against the entire group, qua group, is the cause of action, it is a joint or "true" class action under Rule 23 (a) (1).

[2]To explain why a wrong allegedly committed in 1946 is only now reaching this Court, a brief review of the veterans' efforts to recover their vacation pay is appropriate.

In the fall of 1946, following unsuccessful attempts by the union (UAW) to obtain an adjustment in the veterans' vacation pay, an action in which the union participated was brought by one of the veterans in Detroit, *Neal* v. *General Motors Corp.*, Civil No. 6053 (E. D. Mich.) This action was dismissed with prejudice by the union on June 5, 1947, six weeks after the union's 1947 agreement with defendant was signed.

In 1947, one of the veterans brought an action in New Jersey to recover the lost vacation pay, relying solely on the "escalator" principle, without alleging discrimination. *Dougherty* v. *General Motors Corp.* On appeal, the Third Circuit held the "escalator" rule did not protect vacation pay tied to earnings; but the Circuit on its own initiative expressed considerable misgiving over the possibility of discrimination, though pointing out it had not been alleged. 176 F.2d 561, 563, certiorari denied 338 U.S. 956 (Feb., 1950).

Nine months after this denial of certiorari, several veterans brought an action in Indianapolis, this time alleging discrimination, though pleading it in sketchy terms. *Foster et al* v. *General Motors Corp.* On appeal, the Seventh Circuit held that because the veterans, production workers in defendant's plants, could not by their own affidavits controvert defendant's version of why the peculiar "percentage of earnings" was adopted, defendant's version must be taken as true on motion for summary judgment, and affirmed summary judgment for defendant. Thereby, the Seventh Circuit refused to permit the veterans to have discovery, and trial on the merits. 191 F. 2d 907, certiorari denied 343 U.S. 937 (April, 1952).

Three months later, this action was brought.

The facts here not in dispute. They may be summarized as follows:

The Vacation Pay Provision Before and After 1946

Beginning in 1940, the first year respondent General Motors Corporation (GM) paid vacation pay, a clause providing for vacation pay has been adopted annually by agreement between GM and United Auto Workers Union. Until the 1946 agreement, and for each year since, the annual collective bargaining agreement provided for vacation pay for all hourly-rated employees who were employed on the last day of the vacation year, July 1 to June 30, or, in 1943 and thereafter, a single day in the last weekly pay period at the end of the vacation year. The amount of vacation pay was determined by seniority; those with one-year seniority were entitled to forty hours' pay, and those with five or more years' seniority received eighty hours' pay. During the war years of 1943, 1944, and 1945, when the work week was increased from five to six days, the vacation pay was raised to forty-eight and ninety-six hours' pay (30a-43a; 229 F.2d at 409, 410).

Plaintiff veterans admittedly have the necessary seniority and worked during the last pay period in June 1946 (15a). For those meeting these requirements, *no other work requirement was imposed*—except in 1946 (30a-43a).

1946 Vacation Pay Provision: "Percentage of Earnings"

For this year alone, July 1945 - June 1946, GM initiated, insisted upon, and forced upon the union a formula establishing vacation pay as a percentage of the earnings of each employee (40a-41a). The percentages were 2% for those with one to three years' seniority, 3% for those with three to five, and 4½% for those with five or more years (40a-41a). GM preferred the vacation, or fiscal, year July 1945-June 1946 as the base year, but to secure the acquiescence of the union, modified its demand so that calendar 1945

was agreed to as the base year (38a-40a). The next year, the usual vacation provision was reinstated (41a-42a).

Return of the Veterans

Most of the veterans, some 50,000, returned to GM's employ from military service in the year July 1945—June 1946 (184a). The corporation's plants were closed by a strike lasting from November 21, 1945 to March 19, 1946, almost exactly ¼ of the year (37a-38a, 40a). Because hardly any veterans returned before the strike, very few of these returning veterans had any substantial earnings in this year, and they had practically no earnings in calendar 1945 (71a, 158a).

Respondent's Knowledge of Financial Effects on Veterans

The corporation knew that vast numbers of its employees in the armed forces, perhaps 45,000, would return to its employ immediately after the strike and before the end of the vacation year (87a, 140a-141a, 158a, 191a, 232a-233a); 48,000 did so (65a, 71a, 158a, 184a).

The corporation's negotiators also knew very accurately what financial loss (or gain) would be caused to both veterans and non-veterans by its percentage-of-earnings device, in both its fiscal and calendar year forms, and how much it would thereby save itself, as both the trial court and the Court of Appeals concluded (296a, App. 34) and as respondent itself has admitted (see the specific statements, infra, p. 8; for additional details of evidence showing the corporation's actual knowledge of these effects, see App. 46).

Financial Effects; Veterans' Losses, Respondent's Gains

Such financial effects, as compared to the usual provision, were: Under the fiscal year earnings base proposed by the corporation, GM would have saved itself about $3½ million at the expense of the 50,000 veterans who returned in this vacation year (July 1945-June 1946), and would

have saved itself about $3¾ million at the expense of the 198,000 non-veteran[3] employees eligible for vacation pay that year. Under the calendar year earnings base for which the union held out when the corporation insisted on the percentage-of-earnings device, GM saved almost $4½ million at the expense of the 50,000 returning veterans and lost a little more than $2½ million on the 198,000 non-veterans.[4]

The calendar year device deprived the veterans of vacation pay for work actually performed in this vacation year, about 25% of the working year (perhaps an average of two months after the strike, out of the eight non-strike months). The usual vacation provision deprived them of vacation pay for work up to 75% of the year performed in the years of their departure for military service (since those entering service before April 1 could not work 75% of the pay periods, 30a-43a). In contrast, the non-veterans received vacation pay as usual in the years the veterans left for military service; and in this year of the veterans' return, the non-veterans worked only eight months and got *more* vacation pay than usual. It will be noted that the corporation will not have to make double vacation payments for the same job if the veterans prevail here.[5]

Respondent—Union Negotiations on 1946 Vacation Pay

In the negotiations, the union attempted to retain the

[3] "Non-veterans" in this brief refers to those employees both veterans and non-veterans, who did not return from military service to GM's employ in the year July, 1945-June, 1946. Some of these are, of course, veterans who returned in earlier years, or in later ones, but they are few in comparison to the 50,000 returning in this year—about 15,000 in all other years together (121a).

[4] These figures and their derivation, are set forth in Table 1, and notes thereto, of the Appendix, p. 42-44. During oral argument of the appeal below, Judge Lumbard asked respondent's counsel whether the figures in this Table were substantially correct, and counsel answered that respondent "did not contest" the figures.

[5] In the years of the veterans' departure for military service, their replacements would receive no vacation pay because they lacked one year's seniority (221a). In this year of the veterans' return, the non-veterans they replaced were entitled to vacation pay only if they worked 26 pay periods in fiscal 1946 (41a) which those displaced by the veterans prior to about May 8, 1946 could not have done.

usual vacation pay provision (195a, 197a, 269a) but the corporation formulated and insisted on the percentage of earnings device, allegedly to reduce vacation pay proportionately to the time lost in the strike (219a, 200a).

The corporation's initial offer of 2% (for those with less than five years' seniority) and 4% (for those with five years' seniority) of fiscal year earnings would have achieved this for non-veterans, but would also have deprived the veterans of $3½ million out of a total of $4½ million, as against one-third of the year lost in the strike (Table I, App. 42). The union rejected this (39a, 201a) and the corporation then raised the figures to 3% and 4½% for the three-year and five-year man respectively (203a, 218a). No longer was non-veterans' vacation pay to be reduced proportionately to the strike; instead, the three and four year men were to receive 110% of their usual vacation pay, and five year men about 83⅓; the veterans, however, would still lose over three-quarters of their vacation pay (Table I, App. 42; App. 45). The corporation was aware of these effects of its proposal (219a-220a) and of their unique harshness upon veterans; as its chief negotiator said, "That is obvious." (238a).

The union (whose negotiators were non-veterans)[6] accepted the corporation's percentages, provided that calendar year rather than fiscal year earnings be the base (203a-204a, 215a), and the calendar year base was adopted (259a-260a, 40a-41a).

The effect of the corporation's proposal was to reduce the veterans' vacation pay by $3½ million. The effect of the union's proposal was to eliminate the remaining $1 million of the veterans' vacation pay. The corporation pointed out that "certain employees who had not worked during the calendar year 1945" might receive "substantially less than under" the fiscal year earnings base pro

[6]These negotiators had, however initially sought to retain the usual provision which would have protected the veterans, supra, p. 6-7

These employees GM identified as particularly veterans (182a-184a).

posed by the corporation (39a-40a). The union was also aware that veterans would be especially hard hit (214a).

Respondent's Awareness of Unfairness Toward Veterans

The corporation was conscious that the settlement did not give the returning veterans "all of their equities" (262a), equities of which the corporation was "fully aware" at the time, according to its letter of May 17, 1946 refusing the union's request to treat veterans on a par with non-veterans (111a)—a request made after the veterans had returned and made their interest felt. Among these "equities," said the corporation, was the "*impact upon veterans by loss of vacation pay*" which was balanced against the desirability of settling the strike; "whether the scales would balance out the same" was uncertain (279a), but "*if you characterize it as a price you have to pay, it represents a compromise*" (280a; emphasis added). "[O]ne side has to give on the thing or both sides give, rather, and you finally come to a conclusion, that conclusion is made on the equities of everyone. The main equity was to get the strike settled****" (271a-272a)—and so a "settlement" of this phase of the strike was reached which had the effect of saving GM $2 million, by depriving the veterans of $4½ million and giving $2½ million of it to non-veterans.

Trial Court's Findings and Conclusions

On the foregoing undisputed facts, the trial court found that "During the strike and in the first part of 1946, there were a large number of returning veterans' [tentatively placed at anywhere from 40,000 to 50,000]. The defendant was generally aware of the number of returning veterans and the general effect on them of the 1946 agreement****" (296a). However, the court concluded, defendant was motivated by a desire "to end the strike" (297a), "to begin post war production with the same advantages as defendant's competitors;" "to provide work for the striking em-

ployees, those laid off[7] and returning veterans;" and by a "belief that defendant was justified in reducing vacation allowance by a portion of the strike period" (298a), all of which reasons come down to one, a desire to settle the strike on reasonably favorable terms. Since this, and not "to discriminate against veterans," was defendant's purpose (297a), the trial court dismissed the action (298a).

Decision of Majority Below

On appeal, the majority held that defendant "must have known" that the percentage-of-earnings formula would injure the veterans (App. 35). But the extraordinarily harsh effects of the device on the veterans, plus "knowledge of the defendant that the agreement would have the effect on veterans which it did have" are not sufficient to establish discrimination, said the majority, unless there is also "a purpose or motive to discriminate" (App. 35). Defendant's desire "to end the strike" (App. 36), plus the fact that "defendant originally proposed a formula [fiscal year earning base] which would have given the veterans" $1 million of their usual $4½ million vacation pay instead of taking the entire amount from them (App. 36), was held to establish the absence of any "hostile" purpose by the defendant to discriminate against the veterans. The rule of *Radio Officers* v. *Labor Board*, 347 U.S. 17, "that intent to discriminate is to be inferred from the fact that the discrimination is a natural consequence of the acts performed" was held inapplicable to protect the veterans, on the ground that "under the Selective Service Act," there must be "proof of bad faith" (App. 36-37), citing *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, and *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521.

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[7] At the trial, respondent strongly emphasized that the percentage-of-earnings service inflicted losses not alone on the returning veterans, but also on those "laid off" or on leave and so was not discriminatory against the veterans. However, the evidence shows plainly that none of those "laid off" or on leave was so injured, and respondent did not pursue this point on the appeal.

Dissent Below

Chief Judge Lumbard dissented, on the ground that "since GM knew that the change in its method of computing vacation pay necessarily discriminated against the returning veterans, it had the requisite intent to discriminate," citing *Radio Officers* (App. 39). As the dissent reasoned:

> To require specific proof of a 'hostile' attitude toward veterans, as does the majority, would severely reduce the scope of the rights granted by §8(c). GM's action certainly was not prompted by a dislike of veterans. It was prompted by a desire to settle the matter in issue on favorable financial terms. Section 8 (c) of the Selective Training & Service Act, as I interpret it, requires that this be done in such a way that returning veterans are not in fact treated differently from non-veterans. As the loss to the veterans and the consequent gain to GM are both obvious, I think the agreement with the union was discriminatory.
>
> Nor can GM claim that collective bargaining justifies this discrimination. An employer cannot justify illegal discrimination by proof that a union forced it upon the employer. (App. 39).

Rehearing en banc was denied and this petition followed.

REASONS FOR GRANTING THE WRIT

In holding that discriminatorily depriving returning veterans of vacation pay is, in the absence of a subjective mental attitude of hostility to veterans, not a violation of Section 8 of the Act despite this Court's repeated decisions under the Act condemning devices of discrimination against veterans, the court below has incorrectly decided a question (1) of grave and continuing importance in the administration of the veterans' reemployment statutes, (2) in a manner inconsistent with the principles of this Court's decisions under the Act, and (3) in a manner in-

consistent with this Court's decisions under other statutes having comparable anti-discrimination requirements.

I

The issue here is of major and continuing importance in administering and enforcing the veterans' reemployment statutes, because the identical statutory language involved here is still in effect, and it presently protects over 100,000 of those returning *each year* from military service to civilian life who receive vacation pay under union agreement provisions substantially the same as the usual provision in effect with respondent.[8] The vacation pay protection of 100,000 men each year is therefore directly concerned in the present question. And of course, protection of the 50,000 GM veterans immediately involved in this litigation is of substantial importance in itself.

In addition, this same statutory language protects 600,000 men now returning to civilian life each year from the armed forces. Of these, 400,000 (besides the 100,000 above) receive vacation pay under various other union agreements, or employer programs or practices (Op. cit., note

[8] The Department of Defense (Assistant Secretary of Defense (Comptroller), Directorate for Statistical Services) advises that: from July 1951 to June 1961, releases from the armed forces to civilian life averaged about 785,000 per year; in the current year, taking into account those called up in the Berlin crisis who will be released, those returning to civilian life will total about 640,000; and for the 2,500,000 *minimum* military establishment projected over the foreseeable future, the figure would be about 500,000. Thus, 600,000 per year seems a reasonable figure for the estimate here.

Since the armed services now take only those over 18, since college students are generally deferred, and since the unemployment rate is about 5%, most of those returning to civilian life will have had jobs when they entered military service and will be entitled to reemployment under this Act.

The labor force stood at 70.7 million in April, 1962. *Employment and Earnings*, U. S. Bureau of Labor Statistics (BLS), May, 1962. Of these about 13¼ million, or 19%, receive vacation pay under employer-union agreement provisions essentially the same as respondent's usual provision, on the basis of length of service plus a specified eligibility date. *Paid Vacation Provisions in Major Union Contracts*, BLS Bulletin 1233 (1957), p. 3, 23; *Monthly Labor Review*, August, 1962, p. 875. Thus, 19% of the 600,000 returning each year to civilian life from the armed forces, or 114,000 per year, receive vacation pay under provisions like the usual one here.

8, above).

The President has just received authority to call up an additional 150,000 reservists, and as this is written, the Secretary of Defense has publicly announced the need for a permanent increase in our armed forces; all of these men will be protected by the same provision of the Act involved here. With no end in sight to this time of troubles, the continuing viability of the Act, and its protection against the type of treatment respondent meted out to its returning veterans, seriously concerns these men as they are released from military service in this and future years.[9] Such protection also is essential to drawing our military manpower from civilian sources rather than maintaining a large professional military establishment, and to the morale and effectiveness of those civilians while performing military service as General Marshall explained in 1940.

This Court has, in determining closely related and analogous questions, repeatedly recognized the importance of this problem—the statute's protection of the veterans against discrimination. For in every case considered here which involved a disadvantage imposed on veterans (even though not on them alone), the Court has each time explicitly warned that any discrimination against veterans by any "device of hostility" would violate the statute. *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 59; *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 529; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 336.

The continuing importance attached by Congress and the Executive to preserving the effectiveness of the statutory protection is compellingly evidenced by the amendment of the Act on five separate occasions since World

[9] With the 50,000 in the class here; the 100,000 released each year from military service whose vacation pay is governed by provisions like the usual one here, and the 600,000 leaving military service each year who have reemployment rights under this Act, compare, e.g., the 17,000 in the entire home work industry in *Goldberg* v. *Whitaker House Coop.*, 366 U.S. 28; Petition there, p. 17.

War II—each time in the direction of protecting the veterans more broadly.[10] This year, the President, through the Secretary of Labor, has proposed two additional amendments to the Act, to extend its protection still further. One is directed specifically at another form of discrimination, the proclivity of employers to discharge, not promote, or refuse to hire, members of the Reserve or National Guard because of their continuing military obligation. The other will eliminate the conflict between *Tenzel* v. *United States Steel Co.*, 209 F.2d 185 (C.A. 6), certiorari denied, 345 U.S. 838, and *Moe* v. *Eastern Air Lines*, 246 F.2d 215 (C.A. 5), certiorari denied, 357 U.S. 936.[11] (Letters of the Secretary of Labor to the President of the Senate and the Speaker of the House, July 17, 1962, Appendix, p. 47.)

Vacation pay has itself become a major feature of em-

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[10]In 1948, veterans disabled in service were given the right to an alternate job if the disability disqualified them from the former job (9(b)(B)(ii)); the employer's "successor in interest" was made liable for reemploying the veteran (9(b)(B)(i)); the "escalator" principle was specifically approved as to all elements of the veteran's position, i.e. his "status," and was placed in the statute (9(c)(2)); and the statute was revised to make it clear that damages are "in addition" to, and not in lieu of, reinstatement, and "only the employer" is a necessary party in a veteran's suit (9(d)). In 1951, the three-year maximum limit on military service which could be performed without loss of reemployment rights was raised to four years, because of the Korean conflict (9(g)(1)); and reemployment rights were conferred on those rejected for military service, those taking physical examinations connected with military service, and those performing short tours of training duty (9(g)(4)). In 1955, when the "ready reserve" was established, reemployment rights were given to such reservists taking an initial six-months training duty (9(g)(3)). In 1960, reemployment rights were given to members of the State National Guards taking training duty (9(g)(5)). And in 1961, because of the call-up of reservists over the Berlin crisis, the period of military service which may be performed without forfeiture of reemployment rights was increased by another four years (9(g)(1) and (2)).

[11]The amendment will make it plain that probationary employees are not to be considered as "temporary" and so denied the protection of the Act; rather, on their return, they are to be allowed to complete the balance of their probationary period, and if they do so successfully, their seniority is to be established as if they had done so without interruption for military service, in accordance with the escalator principle and this Court's decision in *Dichl* v. *Lehigh Valley R. Co.*, 348 U.S. 960.

ployment in this country today.[12] Some 50 million workers receive it, including half a million released from military service each year.[13] The substantial volume of litigation over vacation pay is more than ordinarily indicative of its importance; for though vacation payments to individual employees in the immediate post-war years was scarcely large enough to warrant litigation (vide the average vacation claim here, about $90 per veteran), still there were seven cases carried to the Courts of Appeals (excluding this one) and ten others decided by the District Courts.[14] And the occurrence of strikes at individual plants of respondent in the summer of 1946, when it became known to respondent's employees that respondent would insist on literal application of the percentage-of-earnings device to deny vacation pay to the veterans, sufficiently shows the potential of vacation pay for industrial strife.

But more important than this considerable magnitude of

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[12]The trend has been a constant "liberalization of maximum vacation allowances," which has been "accompanied by a reduction in length of service required" to qualify for it; the amount of vacation pay now is commonly three weeks' or a month's pay if the length of service has been substantial. *Paid Vacation Provisions in Major Union Contracts*, BLS Bulletin 1233 (1957), p. 8; *Monthly Labor Review*, August, 1962, p. 875.

[13]In 1943-1944, 86% of the 32.4 million workers in private industry received vacation pay. *Paid Vacations in American Industry*, BLS Bulletin 811 (1945), p. 1-2. Since there are 55.5 million workers in private industry today and the prevalence of vacation pay has increased, 50 million is a reasonable estimate. This indicates also, that 5 out of 7 of those released from military service each year, or almost half a million a year, are affected by vacation pay provisions.

[14]*Brown* v. *Watt Car & Wheel Co.*, 182 F.2d 570 (C.A. 6); *Dougherty* v. *General Motors Corp.*, 176 F.2d 561 (C.A. 3); *Dwyer* v. *Crosby Co.* 167 F.2d 567 (C.A. 2); *Foster* v. *General Motors Corp.*, 191 F.2d 907 (C.A. 7); *MacLaughlin* v. *Union Switch & Signal Co.*, 166 F.2d 46 (C.A. 3); *Mentzel* v. *Diamond*, 167 F.2d 299 (C.A. 3); *Siaskiewicz* v. *General Electric Co.* 166 F.2d 463 (C.A. 2); *Abramowitz* v. *Erie R. R.* (D. N. J., 1956, Civil 356-54); *Cushnier* v. *Ford Motor Co.*, 89 F.Supp. 491 (E.D. Mich.); *Deorletian* v. *Detroit Gasket Co.* (E.D. Mich., 1955); *Horan* v. *Todd Shipyards Corp.* (S.D. N.Y. 1947); *Monticue* v. *Baltimore & Ohio R. Co.*, 91 F.Supp. 561 (N.D. Ohio); *Rydberg* v. *Great Northern Ry. Co.*, 12 F.R.D. 108 (D. Minn. 1951); *Wheeler* v. *Chicago Mil. St. Paul & Pac. R. R. Co.*, 21 Labor Cases, Par. 66,806 (D. Minn. 1952); *Winton* v. *City Truck Co.* (D. Mass., 1949); *Woods* v. *Glen Alden Coal Co.*, 73 F.Supp. 871 (M.D. Pa.)

the vacation pay problem in itself is, again, the need shown by this case for making plain the continuing protection of the veterans—both those who served in World War II and Korea, and the hundreds of thousands released from the armed forces each year, presently and in years to come. The continuing increase in vacation pay as the employee's length of service increases makes this case a rather stark example of why the veterans require this continuing protection. For if GM can cut out vacation pay for veterans in this year when it affected them most severely in number and amounts, it can easily cut military service out of the continuous employment (and so cut down a veteran's vacation pay) for any or every future year by, say, counting as continuous service only those years in which the employee was eligible for vacation pay (which would eliminate this year, for nearly all the veterans).[15]

II

In holding that a mental state of animosity or hostility toward veterans is necessary before the Act can protect

[15] This possibility of impairing World War II veterans' rights and vitiating the statute now or in any future year is in no way fanciful. The impending large-scale cutbacks in railroad employment have led to re-cission of union agreements made after this Court's decision in *Diehl* v. *Lehigh Valley R. Co.*, 348 U.S. 960, and giving effect to that decision. The National Railway Adjustment Board, which had always rejected the *Diehl* principle, has recently approved this elimination of the World War II veterans' seniority credit for time in military service. *System Federation No. 10, Denver & R. G. W. R. R. Co.* NRAB, Second Division, Docket No. 3579, Award No. 3965 (April 18, 1962).

The Eighth Circuit has just denied *Diehl*-type seniority credit to Korean war veterans and those serving since then. *Tilton* v. *Missouri Pacific R. Co.* (August 17, 1962). Certiorari may be sought in *Tilton*.

Cf. *Community Shops, Inc.*, 130 NLRB 158, in which the employer tried unsuccessfully to exclude strike time from the employees' seniority.

As an indication of the present importance of the statutes to veterans, the United States Department of Labor (which administers the reemployment statutes short of litigation) last year reported that 8,632 reemployment cases (which concerned far more individuals) required its affirmative intervention to settle serious disputes involving potential or actual violations of the Act, and that another 52,000 problems arising under the statute were submitted on which the Department had to give advice. *Annual Report of Secretary of Labor*, 1961, p. 222.

them against discrimination, the decision below is contrary to the controlling principles of this Court's decisions under this statute.

In *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 59, the Act was held not violated by a provision placing both veteran and non-veteran employees of a merged shop at the bottom of the seniority roster, because "There was no discrimination against him as a veteran or otherwise than as a member of that group." In *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, placing shop stewards at the top of the seniority roster during the veterans' absence did not violate the Act because the veterans would have been in exactly the same seniority position had they not been absent; but again the Court warned against discrimination, saying, "All this presupposes, obviously, that an agreement containing the 1945 provisions expresses honest desires for the protection of all members of the union and is not a skillful device of hostility against veterans." 337 U.S. at 529. And in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, a change made in the seniority provisions during the veterans' absence, giving seniority credit for military service to those newly hired during and after World War II, did not violate the Act because the military absence of those reemployed had no connection with their drop in seniority standing; the conditions of employment may be changed during their military absence, but only "where the changes are not hostile devices discriminating against veterans." 345 U.S. at 336. These decisions condemned a "*device* of hostility to veterans," not an "*attitude* of hostility." What is decisive is the objective fact of "discrimination against him as a veteran" (*Trailmobile*, 331 U.S. at 59), and not the employer's amiability or vindictiveness while accomplishing the discrimination.

The meaning of these decisions is that the Act removes those on military service from the groups at whose expense compromises can be made in collective bargain-

ing. This case illustrates vividly the "why"—because the veterans were absent and thus unable to make their interest count. The majority's misapprehension on this point is illustrated by its statement that "arrangements which disadvantage veterans have never been held to be violations of the statute in the absence of proof of bad faith." (App. 36-37). Of scores of examples to the contrary, only two need be cited: *Diehl* v. *Lehigh Valley R. Co.*, 348 U.S. 960, and in the vacation pay area, *MacLaughlin* v. *Union Switch & Signal Co.*, 166 F.2d 46 (C.A. 3), both of which corrected the disadvantage which the veterans suffered by reason of military absence.

In relying on *Aeronautical Lodge* and *Ford Motor*, supra, for its holding that the veterans must prove subjective animosity if they are to recover, the majority have misread those decisions. Those cases point up precisely the vice in the percentage-of-earnings device; for there the burden fell equally on both vetrans and non-veterans, all of whom lost the same number of steps on the seniority ladder; no amount of subjective hostility could have invalidated those provisions, because the veterans were not there singled out for adverse treatment and their losses were unconnected with their military absence. Here, the veterans alone have been damaged, and their loss was due solely to their military absence. To be analogous to *Ford Motor* and *Aeronautical Lodge*, the percentage-of-earnings clause would have to be revised to read, "all employees shall receive 2/3 of their usual vacation pay." Such a provision would have prevented this litigation, and would also have achieved respondent's alleged aim of reducing vacation pay proportionately to the strike period.

Protection of the veterans against discrimination is the other side of the "escalator" principle which has guided this Court in every one of its decisions under this Act. If the statute does not confer special advantage ("super-seniority") on veterans, then it must protect them from

being singled out for special disadvantage. And this protection cannot depend on the emotional state of the employer at the time he deliberately imposes the disadvantage for his own profit.

III

The decision below, in holding that the statute effectively protects veterans against discrimination only if the employer is subjectively hostile to them, has departed radically from this Court's decisions under other statutes having similar anti-discrimination requirements. This Court has in closely analogous employment situations held repeatedly and explicitly that the absence of animosity in the employer's attitude, and even proof that his attitude was not hostile, does not obviate discrimination if the natural and foreseeable effects of his conduct are discriminatory.

In *Radio Officers* v. *Labor Board*, 347 U.S. 17, this Court held that where the employer refused to hire a replacement radio operator whom the union had not approved, no specific proof of the employer's intent to encourage union membership was needed, since that was the natural and foreseeable result. The Court's reason for this conclusion was:

> "This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct. (Citations.) Thus an *employer's protestation that he did not intend* to encourage or discourage *must be unavailing where a natural consequence of his action was such* encouragement or discouragement. Concluding that such encouragement or discouragement *will result, it is presumed that he intended* such a consequence. *In such circumstances intent* to encourage *is sufficiently established.*" 347 U.S. at 45 (emphasis added).

Similarly, in *NLRB* v. *Gaynor News Co.*, decided togeth-

er with *Radio Officers*, the conceded absence of a mental attitude favorable to discrimination was held to be irrelevant. There the employer granted increased wages and vacation payments to its union employees only, negotiated through collective bargaining. 347 U.S. at 34-35. "The company refused to make similar payments to any of its non union employees on the grounds that it was not contractually bound to do so, *and in its business judgment*, did not choose to do so." 347 U.S. at 35-36 (emphasis added). The employer also asserted it had not violated the statutory prohibition against "by discrimination . . . to encourage . . . membership", for the reason that there was no specific proof that "the discriminatory treatment of non-union employees encouraged them to join the union" and no specific proof that the employer's action "had such purpose." 347 U.S. at 36. The Court summed it up by saying, "We assume this *concedes that the employer acted from self-interest and* not to encourage unionism." 347 U.S. at 37. Yet this Court held that "*it did not matter that they did not intend* to discourage membership *since such was a foreseeable result*,"—the reason being that there could be "no more striking example of discrimination so foreseeably causing employee response as *to obviate the need for any other proof of intent*." (347 U.S. at 46, emphasis added).

In support of its conclusion in *Radio Officers*, this Court relied on *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793. There, an employer's "no solicitation" rule was applied rigorously and uniformly to all forms of solicitation, and thereby prevented the solicitation of union membership during the employee's "own time" on the employer's premises. Since membership solicitation was part of the statute-protected right to organize, the no-solicitation "rules were no defense" (347 U.S. at 46.) And since the no-solicitation rules thus impinged upon "protected union activity" (347 U.S. at 46) "it did not matter that they did not intend to discourage membership since such was a foreseeable result." (347 U.S. at 46). Because the result

was foreseeable, the employer could not avoid responsibility for the discriminatory effects of his actions by arguing, or even proving, that his action was not "motivated by opposition to the particular union or, we deduce, to unionism," and that "there was no union bias or discrimination by the company in enforcing the rule." 347 U.S. at 45.

Recognizing the compelling force of these principles, the majority below simply refused to apply them, on the ground that "under the National Labor Relations Act there is no requirement of hostility, bad baith or dishonesty of purpose," whereas "under the Selective Service Act arrangements which disadvantage veterans have never been held to be violative of the statute in the absence of proof of bad faith." (App. 36-37). Three days before the opinion below was issued, this Court decided *Katz v. Labor Board*, 369 U.S. 736,[16] which undercut the majority's reasoning that the two Acts should be interpreted differently because the NLRA has no requirement of "bad faith" for a violation.

Katz turned on Section 8(d) of the NLRA, which specifically requires "good faith" in bargaining. The Board rejected the trial examiner's finding of "bad faith" in the employer's unilateral grant of wage increases and change of sick leave benefits during bargaining, but determined that such action violated 8(d) nontheless. A majority of the Court of Appeals held, just as in the present case, that no violation existed unless the employer's subjective state of mind was hostile to the object of statutory protection (collective bargaining there, veterans here). Chief Judge Lumbard's dissent in *Katz* was substantially the same as his dissent here, and this Court took the ground of the dissent, holding that the employer's action "*of necessity*" obstructed collective bargaining. Indeed, said this Court, only in the most exceptional case will such employer action —regardless of motive—not breach the "good faith" re-

[16]Rehearing en banc was requested on the basis of *Katz*, but was denied (App. 41).

quirement, and a finding of "good faith" can *"rarely* be justified." 369 U.S. at 747 (emphasis added.)

Katz therefore vitiates completely the ground on which the majority distinguished *Radio Officers*, *Gaynor* and *Republic Aviation* from the present case. If the employer's subjective attitude and emotions are wholly irrelevant where the statute expressly requires "good faith," they are a fortiori irrelevant here.

But even before *Katz*, it was plain that the principles of *Radio Officers*, *Gaynor* and *Republic Aviation* are equally as applicable under the veterans' reemployment statutes as under the National Labor Relations Act. In *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, where the issue was validity under both statutes of crediting pre-employment military service time toward seniority, this Court twice cited (p. 339 and 342) *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521 (a decision considering discrimination under the veterans' reemployment statutes) for its conclusion regarding the scope of non-discriminatory bargaining under the NLRA. And this Court repeatedly cited discrimination cases arising under both the Railway Labor Act and the NLRA (*Steele* v. *L. & N. R. Co.*, 323 U.S. 192; *Tunstall* v. *Brotherhood*, 323 U.S. 210; *Wallace Corp.* v. *Labor Board*, 323 U.S. 248) to determine the scope of prohibited discrimination in an earlier veterans' reemployment case, *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 45n, 49. The remedial purposes of the two statutes are practically identical, and this Act must be given a "liberal construction for the benefit of the veteran." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285. There is therefore no warrant for the majority's refusal here to follow *Radio Officers*, *Gaynor* and *Republic Aviation*.

The majority's requirement that subjective (rather than objective) hostility to veterans is necessary to trigger the operation of the statute leaves the veterans at the employer's mercy. There is always another reason, a non-

malicious reason, a genuine economic judgment, why the veterans should be discriminated against—or even why they should not be reemployed at all. For it is always inconvenient, and often expensive or inefficient, to disrupt an existing organization or labor force to make room for a returning veteran. Here for example, the employer had a completely valid "business judgment," just as in *Gaynor*, supra, for wanting to discriminate: to save itself money at the expense of those against whom it discriminated. To prevent such "other" reasons from barring the veteran's reinstatement on terms of equality with non-veterans is precisely the reason this statute was enacted, as was agreed by both proponents and opponents of the draft legislation of which it is a part. 86 Cong. Rec. 10109, 10236, 10346, 10443, 10761-2, 11511, 11697 (76th Cong., 3d Sess.) The statutory prohibition against "discharge without cause" of a rehired veteran during his first year of reinstatement (Section 8(c)) sufficiently indicates the Congressional purpose and understanding that the objective facts, and not the employer's subjective attitude toward veterans, must control. If "other" reasons and subjective attitudes could excuse discrimination against veterans, the statute would as a practical matter be effectively nullified.

But more important than this "practical" reason is the fact that any subjective mental attitude, any emotional state, of respondent's toward the veterans—whether animosity or amiability—cannot logically and operably enter into the make-up of the discrimination. As Judge Lumbard, dissenting, said, "GM's action certainly was not prompted by a dislike of veterans. It was prompted by a desire to settle the matters in issue on favorable financial terms." (App. 39). GM admittedly knew exactly how its percentage-of-earnings device would cut out the veterans vacation pay, to its own advantage. In this knowledge, GM deliberately insisted on and signed the agreement. The corporation's mental attitude was simply that it would take for itself the veterans' vacation pay, and give part of

it to the nonveterans to secure the union's acquiescence. Since the principal, if not the only, nexus between the corporation and the veterans was money, this is about as "hostile" as it is possible to be, in the only area where it makes any effective difference to the veterans.[17] This proof of intent goes far beyond the "natural and foreseeable consequences" which sufficed to establish intent in *Radio Officers* and other cases.

The practioner of discrimination will never advertise his bias, which is what the majority in effect requires. Of GM's case, as of Alice's Cheshire cat, the grin is all that is left, and the majority held it to be enough. This is not the meaning of this Court's repeated statements that the Act protects veterans against "skillful devices" of discrimination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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[17] This apparently was Judge Frank's view, for a unanimous court, on the first appeal, when it was held that the complaint herein stated a valid cause of action because it "explicitly alleges that the adoption of the percentage-of-earnings clause for the single year 'was a device of hostility directed at veterans and having a substantial adverse effect on them alone'; that the defendant 'had the purpose' and 'knew and intended' this result; and that defendant 'intended such unlawful discrimination' for 'its own benefit and gain and to the financial injury and loss of plaintiff'." (App. 28; 229 F.2d at 411). See also this opinion that the allegation "that defendant intended, by means of the agreement, to discriminate against vet rans for its own financial gain" constitutes an allegation of "bad faith" (App. 27).

APPENDIX

Opinion of Court of Appeals on First Appeal

(R. 329-337, 229 F. 2d 408)

Decided December 22, 1955; opinion rendered February 8, 1956. Before Frank, Hincks and Waterman, JJ.

Plaintiff sues under § 8 of the Selective Training & Service Act of 1940, 50 U. S. C. Appendix Section 308 (hereinafter referred to as the Act), on behalf of himself and other veterans similarly situated[1] to recover vacation pay for the fiscal year ending in June 1946, which allegedly was denied them by a discriminatory collective bargaining agreement entered into by defendant and plaintiff's union, United Auto Workers, CIO, on March 19, 1946. Plaintiff has been in the employ of defendant since 1933. He entered military service in February 1944, and, after being honorably discharged, was reinstated as an employee on October 30, 1945.

Beginning in 1940, a clause providing for vacation pay has been adopted annually in an agreement between the United Auto Workers Union and defendant, through collective bargaining between defendant and the Union. Until the 1946 agreement, and for each year since, the annual collective bargaining agreement provided for vacation pay for all hourly-rated employees who were employed for any period of time at the end of the vacation year, July 1 to June 30 or, in 1943 and thereafter, a single day in the last weekly pay period at the end of the vacation year. The amount of vacation pay was determined by seniority; those with one-year seniority were entitled to forty hours' pay, and those

[1]The class of veterans to which the plaintiff belongs, and in whose behalf this action is brought, is that of the employees of defendant whose vacation pay is governed by the 1946 collective bargaining agreement, who entered military service, who had one or more years' seniority at the end of the fiscal year ending June 1946, so as to qualify for vacation pay under all prior agreements, who were entitled to reinstatement under the Act, and who were employed in the last pay period in the fiscal year ending in June 1946.

with five or more years seniority received eighty hours' pay. During the war years of 1943, 1944, and 1945, when the work week was increased from five to six days, the vacation pay was raised to forty-eight and ninety-six hours' pay.

On November 21, 1945, the union called a strike which lasted until March 13, 1946. Because of the strike, defendant proposed, in negotiations with the union, that the amount of vacation pay be based on a percentage of earnings for the fiscal year ending in June 1946, rather than on the forty or eighty hours' pay basis used up to that time, in order to reduce vacation pay proportionately to the time lost in the strike. The union objected because this would place the entire burden of the strike on the employees; it proposed that the percentages be applied to earnings during the calendar year 1945. This would be more favorable to the strikers, since the bulk of the strike had taken place in 1946. Defendant agreed, and the new contract provided that the amount of vacation pay was to be fixed at 2%, 3% or 4½% of the employees' total gross earnings for the calendar year 1945, for those with more than one, three, or five years seniority, respectively. Eligibility was still determined by whether an employee worked in the last weekly pay period at the end of June 1946.

The plan ultimately adopted effectively deprived returning veterans of most, if not all, of their vacation pay for 1946, since most of them returned to work in the latter part of 1945; with the strike on from November 21, 1945, they had little earnings in the calendar year 1945. The result would have been the same, though not to such a great degree, if the defendant's plan to take a percentage of the earnings in the fiscal year 1946 had been adopted.

Plaintiff alleged that the agreement deprived veterans in the class, on whose behalf this suit is brought, of rights

expressly granted to them under § 8(c) of the Act. Plaintiff, in particular, alleged that, at the time of the negotiations which resulted in the 1946 agreement, defendant knew and intended that the agreement would have the effect of depriving veterans of almost all vacation pay in the year in which they returned (i.e., calendar year 1945 and fiscal year 1946).

Defendant, in its answer, denied that the purpose or effect of the agreement was to discriminate againt veterans with respect to vacation pay. Both plaintiff and defendant moved for summary judgment. In support of its motion, defendant filed affidavits stating the negotiations between itself and the union and purporting to show that the plan eventually adopted was proposed by the union. It also showed by affidavit that there was no established practice as to vacation allowances, as this was a subject of annual negotiation and agreement. It alleged that, therefore, there was no discrimination within the meaning of the statute.

The court below denied plaintiff's motion for summary judgment and granted the cross-motion of the defendant. It held that, since there was no established practice as to vacation pay, a collective bargaining agreement changing the method of computing the amount as to all employees while the plaintiffs were away did not constitute discrimination as to them. By a summary judgment order, the complaint was dismissed. Plaintiff has appealed.

FRANK, *Circuit Judge*:

1. Vacation pay does not come within those provisions of 50 U. S. C. §308(c), ensuring restoration of a veteran's rights without loss of seniority, but within the provision that a veteran "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on

furlough or leave of absence in effect with the employer at the time such person was inducted" into the Armed Forces. See *Siaskiewicz* v. *General Electric Company*, 166 F. (2d) 463, 465-466 (C. A. 2); *Dwyer* v. *Crosby Company*, 167 F. (2d) 567 (C. A. 2). Consequently, *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, and *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960, are inapposite, since they dealt solely with the seniority provisions of 308(c) and not at all with the "other benefits" provision of that clause. Since vacation pay was subject to annual negotiation and agreement, the court below properly denied the plaintiff's motion for summary judgment since he was not entitled, as a matter of law, to "other benefits" calculated under the 1940 agreement.

2. However, plaintiff also alleged that the collective bargaining agreement adopted in 1946 unlawfully discriminated against returning veterans like himself. If the sole evidence of discrimination were the agreement itself, we would feel constrained by the precedents to affirm the summary judgment. But here plaintiff alleged that defendant intended, by means of the agreement, to discriminate against veterans for its own financial gain. Such an allegation of "bad faith" states a good cause of action, under 308(c), and plaintiff must therefore be given the opportunity at a trial to produce evidence, in addition to the agreement, in support of that allegation.

In *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, the Court significantly ended its opinion thus: "All this presupposes, obviously, that an agreement containing the 1945 provisions expresses honest desires for the protection of the interest of all members of the Union and is not a skillful device of hostility to veterans. There is not the remotest suggestion that the 1945 agreement was other than

what it purported to be. * * *" In *Ford Motor Company* v. *Huffman*, 345 U.S. 330, 338, the Court said that, under NLRA, a collective-bargaining agreement is ordinarily not susceptible to attack, because of discrimination, but that this conclusion is "subject always to complete good faith and honesty of purpose. * * *" Cf. *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 203-204. In *Foster* v. *General Motors* Corporation, 191 F. (2d) 907, 912 (C. A. 7), the court said: "There is no allegation in the complaint that the agreement between the defendant and the union was made in bad faith, and no allegations of fact which, in our view, could form the basis for any legal discrimination." In *Dougherty* v. *General Motors Corporation*, 176 F. (2d) 561, 563 (C. A. 3), the court said that plaintiff "makes no allegation that such discrimination was intended, and in fact he affirmatively states that the situation of returning veterans 'apparently was not considered'."

The complaint in the instant case is markedly different. It explicitly alleges that the adoption of the percentage of earnings clause for the single year "was a device of hostility directed at veterans and having a substantial adverse effect on them alone"; that the defendant "had the purpose" and "knew and intended" this result; and that defendant "intended such unlawful discrimination" for "its own benefit and gain and to the financial injury and loss of plaintiffs."

Defendant argues as follows: (1) The affidavit of Seaton, defendant's labor relations director, flatly contradicts the complaint's unsworn allegations to which we have referred, since it states facts which show that the agreement was in good faith and was not intended by defendant to discriminate against veterans such as plaintiff; (2) the plaintiff filed no answering affidavit; (3) therefore the summary judgment for defendant was proper. That

argument disregards this important factor: The affidavit relates facts peculiarly within the knowledge of defendant's officials; indeed, it recites that Seaton is "familiar with and has personal knowledge" of the facts. In such circumstances (especially where, as here, such a matter as good faith, or the like, is crucial), the granting of a summary judgment is error. For the opponent of the motion is thereby deprived of the opportunity to cross-examine the movant's officials, and is prevented from having a trial court assisted in its evaluation of their credibility by observing their demeanor while they testify. See, e.g.,

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Defendant's argument is peculiarly weak, for plaintiff had submitted interrogatories which defendant had not answered when the summary judgment was entered. Among the interrogatories were these:

"Who represented defendant, or participated on defendant's behalf, in the negotiations with the UAW-CIO which led to the agreement or contract with that union in 1946 governing the terms and conditions of employment of defendant's employees? Which of these participated in negotiation or discussion with the union of the vacation pay provision of that agreement? What are the office and home addresses of each?

"Who among defendant's officials or employees reviewed or approved proposals of defendant concerning the 1946 vacation pay provision? Who reviewed or approved the final provision on defendant's behalf before it was agreed to by defendant? What are the office and home addresses of each?

"Were any instructions, policies, directions, or advice concerning reemployment of veterans sent to division heads or plant managers? If so, on what dates were they sent, who originated and who approved them, who received and who was responsible for acting on them, and what are now (and were then) the titles or positions, and present office and home addresses of each person?

"Were any reports or statements of action taken, policies or programs adopted, numbers of employees affected, or other matters concerning reemployment of veterans prepared at plants or in divisions of defendant? Were any such reports or statements forwarded to high-

Colby v. *Klune*, 178 F. (2d) 872 (C. A. 2); *Bozant* v. *Bank of New York*, 156 F. (2d) 787, 790 (C. A. 2); *Subin* v. *Goldsmith*, 224 F. (2d) 753, 767 (C. A. 2), 76 S. Ct. 1361; *The Alabama Great Southern R. Co.* v. *Louisville & Nashville R. Co.*, 224 F. (2d) 1, 5 (C. A. 5). In *Subin* v. *Goldsmith*, *supra*, we explained why, in such a case, the failure of the opponent of the motion to file a counter-affidavit has no significance. As we there recently discussed this point in detail, we shall not do so here. We note that in *The Alabama Great Southern R. Company* case, 224 F. (2d) 1, 5 (C. A. 5), the Fifth Circuit said: "In many recent cases, where motive, intent, subjective feelings and reactions, consciousness and conscience were to be searched, and examination and cross-examination were necessary instruments in obtaining the truth, we have pointed out that and why the issues may not be disposed of on summary judgment. Other courts have done the same. In *Subin* v. *Goldsmith*, 2 Cir., 224 F. (2d) 753, the majority opinion

> er levels of management of defendants? On what dates were such reports or statements prepared or forwarded, who originated and who approved them, who received and who was responsible for acting on them, and what are now (and were then) the titles or positions, and present office and home addresses of each person?
>
> "What accounting, wage costs, costs of other outlays to employees, financial, or employment data were prepared for or submitted to officials or employees listed in question 18 in connection with 1946 bargaining negotiations with UAW? On what dates were such data prepared or submitted? Who originated and who approved them, who received them, and what are now (and were then) the titles or positions, and present office and home addresses of each person?" [Respondent's answer to this interrogatory was "there was no such data," an answer wholly inaccurate. P. 5-8, supra; App. 45, 46.]

[3] If and to the extent that *Foster* v. *General Motors*, 191 F. (2d) 907, 911-912 (C. A. 7), may perhaps be read as at odds with our conclusion on this point, we disagree with it.

in a thoroughgoing exposition of why a summary judgment should, and should not, be granted in cases of this general nature, collects and cites the controlling authorities."

We think, therefore, that plaintiff is entitled to a trial on the issue of defendant's intention to discriminate against veterans. If the trial court should find the agreement discriminatory, it will have to consider the problem of damages. Our tentative impression is that the damages should be measured by the agreement of April 16, 1945 terminated December 10, 1945. But, as the matter was not argued before us, we think it best to leave the determination, at least in the first instance, to the trial judge, if the question should arise, after he has considered the evidence and arguments of counsel.

Reversed with directions to conduct a trial in accordance with this opinion.

Opinion of Court of Appeals on This Appeal

303 F. 2d 718 (May 24, 1962)

Before Lumbard, C. J., Hays and Marshall, JJ.

Hays, Circuit Judge: This action was brought by plaintiff in behalf of himself and certain other veterans in the employ of defendant to recover additional vacation benefits for the year ending June 30, 1946. The claim is based upon §8 of the Selective Training and Service Act of 1940, 50 U.S.C. App. 308 (1946), which provides:

(Quoting 8 (b) (B) and 8(c), reprinted in Petition here, p. 2.)

This case was the subject of a former appeal to this court. In *Alvado v. General Motors Corporation*, 229 F. 2d 408 (2d Cir. 1956) the lower court's decision in favor of the defendant on a motion for summary judgment was reversed, and the case was remanded for trial. The trial

has now been had and has resulted in a judgment for the defendant, 194 F.Supp. 314. The plaintiff appeals on the ground that the trial court's findings are clearly erroneous.

The facts are extensively set forth in connection with the opinion in *Alvado v. General Motors Corp., supra.* Briefly summarized they are as follows:

Beginning in 1940 defendant negotiated successive collective bargaining agreements with the United Auto Workers Union which provided that vacation pay of one or two weeks pay, depending on length of service, be paid to employees who were in the employ of the company at the end of the vacation year (July 1 to June 30). During the vacation year 1945-46, the employees were on strike from November 21, 1945 to March 19, 1946. In the course of the negotiations for a new collective agreement which would settle the strike, the defendant proposed that the amount to be paid as vacation pay should be based upon the time worked by each employee during the vacation year. This formula would, of course, have reflected the time lost by reason of the strike. After further bargaining a compromise solution was reached by which the amount of vacation pay to be paid for the vacation year 1945-1946 was to be based upon time worked during the calendar year 1945. The following year the former provision for vacation pay based upon weekly earnings was reinstated. Since most of the veterans returned to their jobs after the end of the strike in 1946, they were entitled to no vacation pay for the vacation year ending in June 1946 under the formula applicable to that year, whereas, under the formula used in other years they would have been entitled to one to two weeks of vacation pay.

We do not concern ourselves with difficulties in the

*Now Universal Military Training and Service Act, §9, 50 U.S.C. Appendix §459 (1958).

interpretation of the statute since this court has expressly held that rights to vacation pay of the type involved in the present case are within the compass of the term "other benefits" as that term is used in the statute. *Siaskiewicz v. General Electric Co.*, 166 F.2d 463 (2d Cir. 1948). On the previous appeal in the present case, while the opinion contains language which might be thought to cast doubt on this interpretation of the statute, the court held that the complaint "states a good cause of action under §308 (e)." *Alvado v. General Motors Corp.*, *supra*, at p. 441.

In his opinion on the former appeal Judge Frank, speaking for the court, said:

> "If the sole evidence of discrimination were the agreement itself, we would feel constrained by the precedents to affirm the summary judgment. But here plaintiff alleged that defendant intended, by means of the agreement, to discriminate against veterans for its own financial gain. Such an allegation of 'bad faith' states a good cause of action under §308(e), and plaintiff must therefore be given the opportunity at a trial to produce evidence, in addition to the agreement, in support of that allegation.
>
> In *Aeronautical Indus. Dist. Lodge* v. *Campbell* 337 U. S. 521, 69 S. Ct. 1287, 1291, 93 L. Ed. 1513, the Court significantly ended its opinion thus: 'All this presupposes, obviously that an agreement containing the 1945 provisions expresses honest desires for the profection of the interest of all members of the union and is not a skillful device of hostility to veterans. There is not the remotest suggestion that the 1945 agreement was other than what it purported to be. . . .' In *Ford Motor Company* v. *Huffman*, 345 U. S. 330, 338, 73 S. Ct. 681, 686, 97 L. Ed. 1048, the Court said that, under NLRA, a collective-bargaining agreement is ordinarily 'not

susceptible to attack, because of discrimination, but that this conclusion is 'subject always to complete good faith and honesty of purpose. * * *' Cf. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 203-204, 65 S. Ct. 226, 89 L. Ed. 173. In *Foster* v. *General Motors Corporation*, 7 Cir., 191 F.2d 907, 912, the court said: 'There is no allegation in the complaint that the agreement between the defendant and the union was made in bad faith and no allegations of fact which, in our view, could form the basis for any legal discrimination.' In *Dougherty* v. *General Motors Corporation*, 3 Cir., 176 F.2d 561, 563, the court said that plaintiff 'makes no allegation that such discrimination was intended, and in fact he affirmatively states that the situation of returning veterans "apparently was not considered."'

The complaint in the instant case is markedly different. It explicitly alleges that the adoption of the percentage-of-earnings clause for the single year 'was a device of hostility directed at veterans and having a substantial adverse effect on them alone'; and that the defendant 'intended such unlawful discrimination' for 'its own benefit and gain and to the financial injury and loss of plaintiffs.'" *Alvado* v. *General Motors Corp.*, *supra*, at p. 411.

The case was returned to the trial court to give the plaintiff "the opportunity to cross examine the [defendant's] officials" and to assist the trial court "in its evaluation of their credibility by observing their demeanor while they testify." Id. at p. 412.

We have reviewed the testimony introduced at the trial and the exhibits submitted. They serve to support the conclusion that veterans did not fare as well under the 1946 formula as they would have fared under the formula adopted in other years and that the defendant must have

known that the formula would have this result. The evidence falls short of establishing the propositions for consideration of which the court directed that the cause be tried.

The material presented on the original motion for summary judgment showed that veterans received less favorable treatment under the revised formula and that the defendant must have known this. The case was returned for trial for the purpose of permitting the plaintiff an opportunity through cross-examination to establish that defendant's intent in adopting the formula was to discriminate against veterans, that the formula was "a device of hostility directed at veterans." This the plaintiff has failed to do.

If knowledge of the result alone were sufficient to establish the requisite intent this court's action in returning the case for trial would have been without point, and the court would not have held, as it did, that the plaintiff was not entitled to summary judgment. For the knowledge of the defendant that the agreement would have the effect on veterans which it did have was clearly inferable from the material then available, and was not denied by the defendant. [Note: it *was* denied; Answer, ¶11, P. App. 17a.]

In order to establish a violation of the Act the veteran must show, in addition to knowledge, that there was a purpose or motive to discriminate. In the Supreme Court cases in which disadvantage to veterans was held not to constitute a violation of the Act, there was no doubt that the defendants knew that such a disadvantage would be the result of their arrangements. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330 (1953); *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521 (1949). What was missing was proof of "hostility to veterans," see 337 U. S. at p. 529; proof that the arrangements were not made in "good faith" and with

"honesty of purpose." See 345 U. S. at p. 338.

In order to establish that the motive was not hostile discrimination against veterans, in bad faith and with dishonesty of purpose, it is proper to show what the motive was. In the present case the lower court found, with ample support in the evidence, that the defendant's motive was "to end the strike * * *; to begin post war production with the same advantages as defendant's competitors; to provide work for the striking employees, those laid off and returning veterans; and, lastly, a justified belief that vacation allowance was not a gratuity but rather compensation for work performed and, for this reason, a belief that defendant was justified in reducing vacation allowance by a portion of the strike period."

Also demonstrative of the defendant's motive is the fact that the defendant originally proposed a formula which would have given veterans vacation credit for time worked during the vacation year 1945-1946. It was the Union which proposed the calendar year 1945 as the basis for computing vacation pay.

The plaintiff cites several cases arising under the National Labor Relations Act, particularly *Radio Officers Union* v. *Labor Board*, 347 U. S. 17 (1954), for the proposition that intent to discriminate is to be inferred from the fact that the discrimination is a natural consequence of the acts performed. But the rule as to discrimination which encourages or discourages union membership is clearly different from the rule as to discrimination against veterans. Under the National Labor Relations Act there is no requirement of hostility, bad faith or dishonesty of purpose. Where the action involved is discriminatory and serves to encourage or discourage union membership it is inhibited by the statute regardless of motive. In the cases arising under the Selective Service Act arrangements

which disadvantage veterans have never been held to be violative of the statute in the absence of proof of bad faith. See *Ford Motor Co.* v. *Huffman*, *supra*; *Aeronautical Lodge* v. *Campbell*, *supra*; *Siaskowicz* v. *General Electric Co.* supra.

Judgment affirmed.

Lumbard, Chief Judge (dissenting):

I dissent as I think that there was sufficient proof of General Motors' intent to discriminate against the plaintiff veterans, and I vote to reverse the district court's dismissal of the complaint.

In each of General Motors' fiscal years beginning with 1940, with the sole exception of the fiscal year ended June 30, 1946, GM has given each employee who was in the company's employ at the end of the fiscal year vacation pay amounting to one or two weeks wages, depending on the length of the employee's service.

GM's employees were on strike from November 1945 to March 1946. In the negotiations to settle the strike GM proposed that vacation pay for fiscal 1946 be a percentage of each employee's earnings for fiscal 1946. If the union had accepted, vacation pay would have reflected the 4 months of the fiscal year that the employees were on strike. After considerable bargaining, GM and the union reached an agreement to pay each employee a percentage of his earnings during calendar 1945, during which the employees were on strike only 1 1/3 months. However, the percentage selected was so high that the employees other than returning veterans got over $2,500,000 more vacation pay than they would have gotten had GM computed vacation pay under the method used for every year before and after fiscal 1946.

About 50,000 of GM's World War II veterans returned

to work at GM's plants between the end of the strike in March 1946 and the end of GM's fiscal year on June 30, 1946. Since vacation pay for fiscal 1946 was computed as a percentage of calendar 1945 earnings, these employees received no vacation pay for fiscal 1946. Computing veterans' vacation pay in this manner gave GM a saving of over $4,500,000 as compared to computing their vacation pay in the manner used for previous and succeeding years, and a saving of nearly $1,000,000 as compared to computing their vacation pay as a percentage of their actual earnings during fiscal 1946.

On the previous appeal of this case, this court reversed a summary judgment for GM and affirmed a denial of summary judgment for plaintiff, saying that "plaintiff is entitled to a trial on the issue of defendant's intention to discriminate against veterans." 229 F.2d 408, 412 (2 Cir. 1955), cert. denied, 351 U. S. 983 (1956). At that time plaintiff had not yet introduced the evidence, which is now in the record, proving that the formula selected for fiscal 1946 practically eliminated the vacation pay of returning veterans while increasing non-veterans' vacation pay. The majority opinion concedes that GM must have known that the formula adopted would have this result. Yet the majority does not find "that there was a purpose or motive to discriminate."

The Supreme Court has interpreted §8(c) of the Selective Training & Service Act of 1940, quoted supra in the majority opinion, as prohibiting discrimination against veterans because they are veterans. *Oakley* v. *Louisville & Nashville R. R.*, 338 U. S. 278, 284 (1949); *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 336 (1953); *Trailmobile* v. *Whirls*, 331 U. S. 40, 59-60 (majority), 62-64 (dissent) (1947); *Dichl* v. *Lehigh Valley R. Co.*, 348 U. S. 960 (1955), reversing per curiam 211 F. 2d 95 (3 Cir. 1954). Accord

Staskiewicz v. *General Electric Co.*, 166 F.2d 463, 466 (2 Cir. 1948).

In the closely related field of employer discrimination designed to encourage or discourage membership in a labor union, under §8 (a) (3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3), the Supreme Court has held that although an intent to discriminate is a prerequisite to violation of the statute, *Radio Officers' Union* v. *NLRB*, 347 U. S. 17, 42-44 (1954), there need be no specific evidence of intent "where employer conduct inherently encourages or discourages union membership" since "a man is held to intend the foreseeable consequences of his conduct." *Radio Officers' Union* v. *NLRB*, supra, at 45. Since GM knew that the change in its method of computing vacation pay necessarily discriminated against the returning veterans, it had the requisite intent to discriminate.

To require specific proof of a "hostile" attitude toward veterans, as does the majority, would severely reduce the scope of the rights granted by §8(c). GM's action certainly was not prompted by a dislike of veterans. It was prompted by a desire to settle the matters in issue on favorable financial terms. Section 8(c) of the Selective Training & Service Act, as I interpret it, requires that this be done in such a way that returning veterans are not in fact treated differently from non-veterans. As the loss to the veterans and the consequent gain to GM are both obvious, I think the agreement with the union was discriminatory.

Nor can GM claim that collective bargaining justifies this discrimination. An employer cannot justify illegal discrimination by proof that a union forced it upon the employer. *Radio Officers' Union* v. *NLRB*, *supra*; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

Nevertheless, the veterans should not get vacation pay

as if they had been working for the entire fiscal year 1946. The majority cites *Aeronautical Ind'l Lodge* 727 v. *Campbell*, 337 U. S. 521 (1949), and *Ford Motor Co.* v. *Huffman*, 345 U. S. 330 (1953), as holding that changes which disadvantage veterans are legal so long as there is no explicit proof of hostility to veterans. But I read them as holding that reasonable changes occurring in the regular course of collective bargaining do not violate the statute. Provisions which are not at all uncommon, see *Aeronautical Ind'l Dist. Lodge* 727 v. *Campbell*, *supra*, at 528, such as the computation of vacation pay on the basis of the amount of work rendered, should not be struck down. This court has expressly held that vacation pay is an incident of actual work and that veterans need not be treated as if they had been at work while in military service. *Siaskiewicz* v. *General Electric Co.*, 166 F.2d 463 (2 Cir. 1948); *Dugger* v. *Crosby*, 167 F.2d 567 (2 Cir. 1948). Therefore, a GM contract to pay an employee, veteran or non-veteran, a percentage of his earnings during the fiscal year 1946 would have been valid. Such an agreement would not have discriminated against veterans any more than GM's refusal to give vacation pay to veterans during fiscal 1944 or 1945 while they were in military service the entire year. However, GM's decision to pay a percentage of calendar earnings produced an unjustified discrimination against veterans. Although many veterans worked between the end of the strike and June 30, 1946, they got no vacation pay therefor. The majority quotes the trial court opinion as saying that GM had a "a justified belief that vacation allowance was '. . . compensation for work performed." Consequently, the veterans are entitled to vacation pay based upon a percentage of their actual earnings during the fiscal year 1946.

I would reverse and remand for computation of the plaintiff's damages.

ORDER

(21a) * * * on the twenty fourth day of May, one thousand nine hundred and sixty two, * * * this cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, ad judged and decreed that the judgment of said District Court be and it hereby is affirmed.

Filed May 24, 1962. (22a)

[A petition for rehearing en banc was filed June 6, 1962 (23a)]

ORDER ON PETITION FOR REHEARING

The petition is denied.

Hays and Marshall, JJ.

I dissent and vote to grant rehearing.

Lumbard, J.

June 15, 1962

ORDER ON PETITION FOR REHEARING IN BANC

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

15 June 1962

Lumbard, C.J.

TABLE I

GM's Savings on Veterans and Non-Veterans Compared for Both GM Proposal and Union Proposal in 1946

	Total Number	Average Return Date	Earnings Rate and Period	Fiscal Year Earnings	Calendar Year Earnings	Seniority Group	Vacation Pay Under: Usual Provisions (40 and 80 Hours)		Fiscal Earnings	Calendar Earnings	Savings per Man: Fiscal	Savings per Man: Calendar	No. in Seniority Group [h]	Total Savings: Fiscal	Total Savings: Calendar
ans	2,000 [a]	10/1/45 [c]	7 weeks, 1945 at $55.90 [e]	$ 391.30	$ 391.30	1 to 2 years	$ 53.93	at 2%	$ 22.38	$ 7.83	—	—	NIL	—	—
			13½ weeks, 1946 [f] at $53.93 [g]	728.05		3 to 4 years	53.93	at 3%	33.58	11.74	$20.35	$42.19	667	$ 13,563	$28,140
						5 years and over	107.86	at 4½%	50.35	17.61	57.51	90.25	1,333	76,660	120,307
				1,119.35											
	48,000	5/1/46 [d]	8⅔ weeks, 1946 at $53.93	467.39	$ —0—	1 to 2 years	$ 53.93	at 2%	$ 9.34	$ —0—	—	—	NIL	—	—
						3 to 4 years	53.93	at 3%	14.02	$ —0—	$39.91	$53.93	16,000	$ 628,560	$ 862,880
						5 years and over	107.86	at 4½%	21.03	$ —0—	86.83	107.86	32,000	2,778,560	3,441,520
														$3,497,340	$4,452,843
ans	198,000 [b]	Not applicable	20 weeks, 1945 at $55.90	$1,118.00	$1,118.00										
			13½ weeks, 1946 at $53.93	728.05		1 to 2 years	$ 53.93	at 2%	$ 36.92	$ 51.42	$17.01	$ 2.50	1,000	$ 17,010	$ 2,500
				$1,846.65		3 to 4 years	53.93	at 3%	55.38	77.14	(1.45)	(23.21)	66,000	(95,700)	(1,531,860)
						5 years and over	107.86	at 4½%	83.07	115.71	24.79	(7.85)	131,000	3,247,490	(1,028,350)
			26 weeks, 1st half of 1945 at $55.90		$1,453.40									$3,168,800	($2,557,710)
					$2,571.40										

*For footnotes, see next two pages

Parentheses denote loss to GM, i. e. increase in vacation payment made to employees

FOOTNOTES TO TABLE I

[a] 2,000 is an estimate conservative so far as the impact on veterans is concerned (see p. 13, supra). At most 3,000 *could* have returned in this period, but only if *no* veterans returned in the period 12/44-6/45. And even if this were the case, the only effect would be to change the figure "2,000" to "3,000" and the figure "48,000" to "47,000" — and this would have a negligible effect on GM's savings.

[b] 248,000 is, according to GM, its total hourly-paid employment at the end of the vacation year, June, 1946. (189a) But see note 18, p. 27, above, indicating a more accurate figure might be about 225,000.

[c] 10/1/45 is a conservative estimate (i. e. the date is early rather than late, and so results in higher estimated earnings) of the average date of return for the 2,000 who returned in the pre-strike portion of the vacation year. The rate of return went up markedly toward the end of 1945 (158a) and an *even* rate of return over the period would have placed the average date at Sept. 10 rather than Oct. 1. The Armed Forces figures (121a, 123a) show no notable jump in the demobilization rate until Sept., 1945. "October 15" would thus have been a more supportable average date of return.

[d] 5/1/46 is likewise a conservative estimate (i. e. it is early, and so maximizes earnings) of the average date of return for the 48,000 who returned during the vacation year after the strike. Plant reopening after the strike took time; only about half the strikers had come back to work by April 1 (190a, no. 20); salaried employees numbered 113,000 and hourly paid 223,000, at the end of 1945 (1945 Annual Report, p. 8, R. 435) leaving 107,000 hourly paid at work on April 1. Some plants did not open until May 13, 1946 (1946 Annual Report, p. 16, R. 446). The New Departure Manual (135a-139a) indicates it takes about a week (with interviews, examinations, etc.) to get the veteran on the job after he applies for reemployment and that veterans will frequently take a vacation after release from military service before coming back to work. April 8 was therefore about as early as GM could have reemployed any of the veterans. A straight-line rate of return from April 8 to June 30 gives May 20 as the average date of return. No doubt many veterans released from service during the early part of the strike were ready to return promptly upon its settlement; this factor is offset by the long delayed reopening of many GM plants. For these reasons, "May 1" seems a reasonably conservative average date of return.

[e] $55.90 is the average weekly earnings in 1945 (71a). A further refinement of the arithmetic is possible, for overtime was greater in the first half of the year, and the straight time average hourly rate was higher in the last half (90a-91a). Such further refinement would show somewhat higher earnings in the first half than in the last half; but since the same figure is used for veterans and non-veterans, the principal effect of the more accurate computation would be to increase slightly the difference for both groups between the fiscal and calendar year proposals. The average weekly earnings for the year is used, not to over-simplify the arithmetic, but because it is the figure used in GM's 1945 Annual Report, published three days before the strike ended, and this was the figure immediately before GM's negotiators when they were considering and discussing vacation pay with the union.

[f] 13½ weeks is figured as the average time worked by GM plants in the vacation year after the strike. Since only about half the hourly paid employees were back by April 1, and because of other factors mentioned in note (d) above, the average time worked did not run from March 19, the day the strike ended, but from about April 1 or perhaps a day or two later.

[g] $53.93 is the average weekly earnings for 1946 (83a). Use of this figure in the table assumes that $53.93 equals the 40 hours pay granted by the usual provision. Actually the 40 hour week worked in 1946 results in work of 38-39 hours per week (89a, note 16). The usual 40 hours pay would thus be *more* than this figure, which would magnify GM's savings at the veterans' expense. On the other hand, "2%" of earnings is slightly less than one week in 52.

[h] Evidence in the record indicates that a reasonably accurate estimate is that about ⅓ of both veterans and non-veterans were in the 3 to 4 year seniority group, about ⅔ in the 5 year and over group, and a negligible number in the 1 to 3 year group (note 12, p. 20, supra). Seaton himself indicated, by saying the calculation was "simple" if the number with three years' seniority was known, that there were hardly any in the 1 and 2 year group (219a-220a).

On this point as on others, plaintiffs have attempted, by interrogatories filed before the appeal and by a Demand for Production since then, to obtain definite facts on the seniority grouping of veterans and non-veterans (220a, 58a). The court below denied these efforts at discovery, on the ground it was irrelevant (54a, 64a).

Evidence in support of the estimate is as follows: Hardly any of the returning veterans had less than three years' seniority. Their military service was generally about 30 months (121a, 124a, 125a, 126a) and the point system of demobilization delayed the return of veterans with short military service. To acquire seniority at GM, they had to work an additional six months before military service. (Agreement between UAW and GM, par. 57). Since the draft age was not lowered below 21 until late in the war, it is likely that the veterans worked at least a year or more for GM before entering military service.

Similarly, most of the non-veterans had over three years' seniority, and many had over five. At the time of the strike, employment had not been so low since 1941 and peak employment had been attained in 1944 (84a). That the work-week remained over 40 hours throughout 1945 (90a) indicates the cutback in production was handled principally by layoff. Since layoffs were in seniority order, few with less than three years seniority could have survived. (This might have been different had GM closed entire plants as war production ended and retained other plants in full production; but only "a few" plants were entirely closed, 222a, 223a). Seaton's suggestion (222a) that some plants might operate at a very high level and others very low ignores the economic fact that layoffs, if made, are done in "steps" rather than a straight line—entire shifts, or production lines, are shut down, not a few employees laid off in every operation. At the end of 1945, apparently only one plant, the Allison jet engine plant in Indianapolis, was operating at full capacity (75a).

All these factors considered, the estimate seems reasonable. *But even if the estimated ratio of* those in the 3-4 year seniority group to those in the 5 year group *were substantially different, the veterans would still be the only losers, their loss would be the same*, and nonveterans would lose nothing. And GM would still have achieved its "own benefit and gain," by "settling the strike" solely at the veterans' expense (on this issue) and saving itself the money they lost.

Additional Advantage To Non-Veterans of Percentage-of-Earnings Device

GM's fiscal year formula gave the nonveterans the advantage of basing vacation pay on overtime and other premium wages, which were excluded from the vacation pay base under the usual provision (30a 43a). This advantage amounted to about a 10% increase in vacation pay, and resulted in giving about 110% of the usual vacation pay to the three year man and about 83% to the five year man.

The 10% increase is derived as follows: straight time average hourly earnings in 1945 were about $1.11 (91a); average weekly hours worked were 43.8 (71a), for $48.62 average straight time weekly pay; average earnings, however, were $55.90 (77a), or $7.28 attributable to premium pay; this is an increase in the vacation pay base of ($7.28 ÷ $48.62), or about 15%; but since only about 2/3 of the work time in fiscal 1946 fell in 1945, and a 40 hour week was scheduled in 1946 (83a), the actual increase in vacation pay is about 10%.

The 110% and 83% figures are derived thus: 67% of work time remained in the fiscal year, after deduction of the strike period; the 10% increase from overtime, above, gives 73.7%, plus the 50% increase (one week's, or 2% of earnings raised to 3% for three year man) = 110%. For the five year man, the figures are 73.7% plus the 12½% increase (two weeks', or 4% of, earnings raised to 4½%) =83%.

Table I (App. 42), showing the actual dollar results per man in each category, shows a slightly smaller increase than these percentages. Loss of one-half week of work because of V-J Day celebration (90a, note 2) accounts for most of this difference.

GM was aware of this additional increase in vacation

pay for nonveterans under its fiscal year formula, for GM pointed this out specifically to the union in the bargaining at the end of February, 1946 (195a-196a).

Detailed Evidence of Respondent's Knowledge of Financial Effects

The corporation counted its employees "actually working each week" (77a-80a, 83a, 84a), recorded month-by-month their straight-time average hourly earnings to the nearest tenth of a cent (91a), recorded each month their average weekly hours worked to the nearest tenth of an hour (90a), and recorded their average weekly earnings to the nearest cent and their average annual earnings to the nearest dollar (71a, 77a, 80a-81a).

All of this information for the 11 months preceding the strike (calendar 1945) was published by the corporation while the negotiations were in progress (71a, 77a, 87a, 91a). The corporation's negotiators got these figures monthly (218a) and admittedly "have the statistics in mind" in negotiating with the union about vacation pay (280a-281a). Indeed, they *knew* the statistics (209a, 210a, 211a-212a, 223a-224a, 233a-234a), and at one point in the vacation pay negotiations, they discussed some of the statistics (198a, 199a). The negotiators admittedly "pay attention to wage rates when we are talking about wage increases" and to "costs and the effects of an increase against what the men are earning" (218a), so that GM admittedly knew its wage costs for both the fiscal and calendar years. Since the corporation's percentage-of-earnings device made vacation pay a function or derivative of wages, the corporation necessarily knew the financial effects of the device on veterans and non-veterans, for both the fiscal and calendar years.

Letter of the Secretary of Labor to the Speaker of the House and the President of the Senate

July 17, 1962

The Honorable John W. McCormack
Speaker of the House of Representatives
Washington 25, D.C.

Dear Mr. Speaker,

I am enclosing copies of a draft bill "To amend and clarify the reemployment provisions of the Universal Military Training and Service Act, and for other purposes" and copies of an explanatory statement describing the proposed legislation.

This bill is designed to improve the existing reemployment provisions of the Universal Military Training and Service Act through two amendments. The first amendment makes clear that probationary employees who are called into military service are entitled to reemployment rights. This change is necessitated by the existing conflict in court decisions interpreting the Act, some of which held that probationary employees are engaged in temporary employment. The Act's reemployment provisions, as you know, are not applicable to temporary employees. Consequently, under this interpretation, probationary employees suffer a loss of employment rights solely because of their military absence, a situation which should be corrected.

The second amendment contained in this bill adds two new paragraphs to the Act. The first of the proposed paragraphs provides that reservists and guardsmen shall not be denied retention, promotion or other advantages of employment because of any obligation as a member of a reserve component of the Armed forces. The second paragraph expresses "the sense of Congress" that any persons seeking employment with a private employer, the Federal Government, or any State or political subdivision thereof, shall not be denied employment because of any obligation

for future active or inactive military service or training in the Armed Forces or reserve component thereof. These provisions are proposed as a result of complaints that some young men are unable to obtain employment or are being disadvantaged in their existing employment because of real or potential military obligations. On the basis of available information, it is not possible for us to determine the full extent of this problem, since the number of complaints received is not necessarily indicative of the actual number of employers who engage in these practices. It does appear, however, that at least from a geographical standpoint, engagement in such practices is widespread. The proposed amendment should be of considerable help in correcting the existing situation, in the instances where disadvantages occur, and in discouraging the incidence of these practices in the future.

A technical amendment, having no substantive effect, is also included in the bill.

This bill is part of the legislative program of the Deptment of Labor, and the Bureau of the Budget advised on July 3, 1962, that there is no objection to the presentation of the proposal for the consideration of the Congress.

Enactment of this bill is not expected to require an increase in funds for administration and enforcement.

Yours sincerely,

/s/ Arthur J. Goldberg
Secretary of Labor

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

JAMES ALVADO,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 467

JAMES ALVADO,[1]

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court is reported at 194 F. Supp. 314 (Petitioner's Appendix, Court of Appeals 288a). The opinion of the Court of Appeals on the first appeal is reported at 229 F. 2d 408 (Petitioner's Appendix 24). The opinions of the Court of Appeals on this appeal are reported at 303 F. 2d 718 (Petitioner's Appendix 31, 37).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

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[1] There is only one petitioner. Francis M. Bilbee, one of the parties in the *Foster* case, expressly requested that he be dropped as a plaintiff since his rights were there litigated. See 194 F. Supp. 314, footnote 1.

Question Presented

The only question presented is the correctness of the Second Circuit's judgment approving the trial court's findings that "plaintiff has failed to establish that there was collusion between the Union and the defendant, or that defendant intended to discriminate against veterans, or that defendant agreed to the Union proposal in bad faith", in adopting the 1946 collective bargaining agreement. In other words the Second Circuit held that petitioner has failed to prove the cause of action alleged under the Act, 303 F. 2d 718, aff'g 194 F. Supp. 319 (Petitioner's Appendix 31).

Statute Involved

The pertinent provisions of the Selective Training and Service Act of 1940 (50 U.S.C. App. 308, now Universal Military Training and Service Act Section 9, 50 U.S.C., App. 459) are set forth in the Petition at pages 2, 3.

Statement of the Case

This is the fourth time the validity of the vacation pay provision in the 1946 collective bargaining agreement entered into by the respondent with the petitioners' Union has been before this Court on Certiorari. On each of the three prior occasions, petitioners sought review of the decisions of three Circuit Courts which had refused judgments in their favor on the merits. This Court denied certiorari in each. *Dougherty* v. *General Motors Corp.*, 176 F. 2d 561 (3rd Cir. 1949), 338 U. S. 956, No. 518, February 13, 1950; *Foster et al.* v. *General Motors Corp.*, 191 F. 2d 907 (7th Cir. 1951), 343 U. S. 906, No. 533, March 24,

1952; and *Alvado* v. *General Motors Corp.*, 229 F. 2d 408 (2d Cir. 1956), 351 U. S. 983, No. 931, June 11, 1956 (Respondent's Appendix, Court of Appeals, 1a).

The salient facts are briefly summarized for the convenience of this Court.[2]

The complaint at bar, filed July 29, 1952, charged an alleged "discrimination" against petitioner, a veteran, and the class he purportedly represents, by virtue of the vacation pay provisions of this 1946 collective bargaining agreement. Recovery of vacation allowance for the year 1946 was demanded on the ground that this alleged discrimination violated the Act.

Vacation allowance had been the subject of collective bargaining between respondent and petitioner's collective bargaining agent beginning in 1940. The provision was renegotiated each year.

The 1946 provision under attack used earnings of the previous calendar year rather than of the fiscal year as the basis for determining a vacation allowance. It was adopted as a result of collective bargaining negotiations which took place during a lengthy strike which commenced on November 21, 1945 and terminated on March 19, 1946. This strike, which lasted 113 days, terminated with the execution of the collective bargaining agreement in which this vacation arrangement was incorporated. The provision here under attack was a counter proposal by the

---

[2] We take issue with petitioner's summary of the facts commencing at page 4. The statement at page 5 thereof, "that the Corporation's negotiators also knew very accurately what financial loss (or gain) would be caused to both veterans and non-veterans by its percentage of earnings device . . .", is grossly inaccurate. This misstatement is readily apparent from a reading of petitioner's very citations of authority (Opinion of Trial Court, Petitioner's Appendix, Court of Appeals 296a and Opinion of Court of Appeals, Petitioner's Appendix 34).

Union to a suggestion by the Corporation which sought to use the fiscal year July 1945 to June 1946 as the basis for computing vacation pay allowance.

Summary Judgment was granted the defendant and plaintiff's cross-motion for similar relief was denied. On appeal, the Second Circuit held that the denial of plaintiff's motion for Summary Judgment was proper since vacation pay was subject to annual negotiation and agreement and appellant was not entitled as a matter of law to vacation pay ("other benefits under the Act"). At the same time, the order granting Summary Judgment in favor of defendant was reversed on the ground that it deprived the plaintiff of the opportunity to cross-examine defendant's officials on the issue of "bad faith" and prevented a trial court from an evaluation of their credibility by observing their demeanor while they testified. The Second Circuit also directed that the plaintiff be given the opportunity at a trial to produce evidence in addition to the agreement in support of the allegation of the complaint charging "bad faith" (229 F. 2d 412; Respondent's Appendix, Court of Appeals 5a).

The plaintiffs, not content to be sent to the trial court, petitioned this Court for certiorari (October Term, 1955, No. 933). The petition was denied (351 U. S. 983, *supra*).

The trial directed by the Second Circuit finally took place in January 1961 and resulted in a judgment in favor of the defendant dismissing the complaint (194 F. Supp. 314). The petitioner there had the "opportunity at a trial" to present evidence and was afforded a complete cross-examination of Louis G. Seaton, the defendant's vice president, to whom specific reference had been made in the Second Circuit's opinion directing the trial (229 F. 2d 411 at 412; Respondent's Appendix, Court of Appeals 5a).

After entry of this judgment, petitioner again filed an appeal to the Second Circuit. On May 24, 1962 that Court affirmed the judgment of the trial court (one judge dis-

senting) 303 F. 2d 718 (Petitioner's Appendix 31). Petitioner's application for a rehearing and request for rehearing *en banc* were denied on June 15, 1962. The present petition for certiorari was thereafter filed.

Argument

The petitioner asserts at page 10 that the court below erred in holding "that discriminatorily depriving returning veterans of vacation pay is . . . not a violation of Section 8 of the Act."

A review of their opinion discloses no such holding. The Second Circuit held that to establish *legal discrimination* and recover under the Act there must be proof of a "purpose or motive to discriminate" rather than a mere showing of disadvantage to veterans (303 F. 2d 718, at 721; Petitioner's Appendix 35). This determination is in harmony with the decisions of this Court. An analysis of these cases reveals that this Court has consistently distinguished between disadvantage to veterans and legal discrimination which constitutes a violation of the Act. Indeed no case has been cited where this Court held such disadvantage constituted discrimination. Petitioner's main arguments are founded upon the misuse of the word "discrimination". It is submitted that no amount of strained semantics nor tables[3] attached to the petition warrant review by this Court on certiorari.

I

The decision below is consistent with the principles established by this Court.

Vacation pay does not come within those provisions of the Act insuring restoration of a veteran's rights without

[3] Table I at page 42 of the petition was not in evidence at the trial. It first appears in the petitioner's brief on appeal to the Court of Appeals.

loss of seniority. It comes within the provision of the Act that a veteran "shall be entitled to participate in insurance and other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence, in effect with the employer at the time such person was inducted" into the Armed Forces. *Alvado* v. *General Motors Corporation*, 229 F. 2d 408, cert. den. 351 U. S. 983 (1956); *Siaskiewicz* v. *General Electric Co.*, 166 F. 2d 463 (2 Cir. 1948); *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (2 Cir. 1948).

The Second Circuit pointed out that respondent's pre-1946 collective bargaining agreements were negotiated and changed annually and there was no established rule or practice as to vacation pay at the time the petitioner and the class he represents entered military service. That part of the 1946 collective bargaining agreement which contains the vacation pay provisions is therefore not *per se* violative of the Act insofar as applicable to returning veterans. *Alvado* v. *General Motors Corp.*, *supra*.

In *Aeronautical Indus. Dist. Lodge* v. *Campbell*, 337 U. S. 521, and *Ford Motor Company* v. *Huffman*, 345 U. S. 330, this Court had before it for review under the Act, certain provisions of collective bargaining agreements which were disadvantageous to veterans. In both instances this Court held that the provisions were not *per se* violative of the Act. In each case the employer defendants knew that such disadvantage would be the result of their agreements with the Union.

In *Ford Motor Company* v. *Huffman*, *supra*, this Court stated at 345 U. S. (p. 338):

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employes and classes of employes. The mere existence of such differences does not make them invalid. The complete satisfaction of

all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables."

In the instant case the complaint charged that the vacation pay provision "was a device of hostility directed at veterans and having a substantial adverse effect on them alone," that the defendant "had the purpose" and "knew and intended" this result; and that defendant "intended such unlawful discrimination" for "its own benefit and gain and to the financial injury and loss to plaintiff."

The Second Circuit held that the agreement itself did not violate the Act, although some disadvantage to veterans resulted, 229 F. 2d 408, *supra*. It directed a trial of the issue of "bad faith" as alleged in the complaint.

The true motives of the respondent in accepting the Union's vacation pay proposal were amply demonstrated at this trial by petitioner's attorneys themselves in their exhaustive and cumulative examination of Louis G. Seaton. This individual was the respondent's Vice President referred to in the Second Circuit's opinion. Indeed, he was called as a witness by the petitioner's attorneys themselves. After reviewing his testimony and all of the exhibits, the trial court stated (194 F. Supp. 314 at 318; Petitioner's Appendix, Court of Appeals 295a).

"* * * The intent of the defendant in agreeing can readily be said to have been to end the strike, to begin post-war production, to reach a fair and equitable agreement, and not, as the plaintiff contends, to discriminate against the returning veterans. The evidence adequately supports this, and the defendant in

its over-all program surpassed the basic protection afforded veterans by the Selective Training & Service Act."

The Second Circuit approved this finding of fact and held it was not clearly erroneous[1] (303 F. 2d 718; Petitioner's Appendix 31).

We believe that one comment by the petitioner at page 9, footnote 7, of the petition requires specific mention. There petitioner asserts that only veterans sustained adverse effects as a result of the vacation pay provisions and "the evidence shows plainly that none of those 'laid off' or on leave was so injured, and respondent did not pursue this point on appeal". It is difficult to reconcile this assertion with the express finding of the trial court that the vacation pay provisions "also militated against all those employes, admittedly a smaller group than the veterans, who for one reason or another were on leave of absence other than military in 1945, and those employes who were laid off but returned in the first part of 1946 and who retained their seniority" (194 F. Supp. 319; Petitioner's Appendix, Court of Appeals 297a). This was one of the findings of the trial court, held not be to "clearly erroneous" by the Court of Appeals (303 F. 2d 718; Petitioner's Appendix 31).

II

A real and vital distinction exists between this Court's decisions under Section 8 of the Act and determinations of legal discrimination under other federal statutes.

The petitioner's argument in the main is based on the principles set forth in *Radio Officers* v. *Labor Board*, 347

[1] This Court has held that the clearly erroneous rule (F.R.C.P. 52a) is peculiarly applicable to cases involving the necessity of proving intent. *U. S.* v. *Yellow Cab Co.*, 338 U. S. 338; *U. S.* v. *Oregon State Medical Society*, 343 U. S. 326.

U. S. 17; *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793, and *Katz* v. *Labor Board*, 369 U. S. 736. These cases construed an employer's conduct under the National Labor Relations Act. We have no quarrel with these cases but we do contest their applicability here. Petitioner cites these cases for the proposition that an inference of intent to discriminate must be made as a natural consequence if the act performed is disadvantageous to veterans.

These cases sanction the Congressional declaration in the National Labor Relations Act that an employer may not encourage or discourage Union membership, and is required to bargain in good faith. Clearly, hostility, bad faith, or dishonesty of purpose are there immaterial if either of these declarations of Congressional intent are thwarted by an employer's conduct. But the rule of these cases is clearly different from the established law as to discrimination against veterans under the Selective Service Act. In the cases arising under the Act, this Court has stated Congressional intent to be that agreements which disadvantage veterans are not *per se* violative of the Act in the absence of proof of bad faith. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, *supra; Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, *supra.*

Though permitted full opportunity at a trial, the petitioner has failed to adduce such proof in the case at bar. *Alvado* v. *General Motors*, 303 F. 2d 718 at 721 (Petitioner's Appendix 31).

III

The law with respect to vacation pay ("other benefits") under the Act is now well settled.

The petitioner urges that the question involved herein is "of grave and continuing importance in the administration of the veterans' re-employment statutes". Finding no support for this assertion in a synthesis of the reported

cases under the Act,[5] the petitioner seeks to interject new matter before this Court. The main thrust of this argument is pitched on private advices from the Department of Defense, statistics from the Bureau of Labor Statistics, the Monthly Labor Review or proposals for new legislation from the Secretary of Labor.

Clearly, these documents are irrelevant to the question involved.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be denied.

ALOYSIUS F. POWER,
Attorney for Respondent,
General Motors Corporation.

GEORGE A. BROOKS,
EDWARD B. WALLACE,
JOHN J. HIGGINS,
Of Counsel.

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[5] The cases cited in footnote 14, page 14, of the petition fail to substantiate this contention. An analysis of these cases discloses that all of the Courts of Appeals which considered the question of vacation pay under the Act are in harmony. It also is significant that none of the causes of action involved therein arose during the last ten years. The absence of litigation during this period is no doubt attributable to these decisions which have clearly established veterans' rights. See American Law of Veterans (2nd Edition, 1954), Sec. 193, page 147, especially footnote 3.

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No. 467

In the Supreme Court of the United States

OCTOBER TERM, 1962

JAMES ALVADO AND FRANCIS M. BILBEE,
Petitioners

v.

GENERAL MOTORS CORPORATION
Respondent

REPLY MEMORANDUM IN SUPPORT OF PETITION

One point in respondent's brief requires correction. This is respondent's attempt (Brief in Opposition, p. 8) to indicate that employees laid off or on leave were also injured in the same way as veterans by the percentage-of-earnings device.

Petitioners reviewed in detail the evidence on this point in their brief in the Court of Appeals, and showed conclusively that those on layoff and on leave of absence were *not* injured by the device. GM then abandoned this contention without a single mention of it in the Court of Appeals, and it is hardly proper to seek to revive it here. It will be noted that the corporation even now avoids stating that any of those on leave or layoff were in fact damaged by the device. Both the majority and the dissent in the Court of Appeals of course disregarded this contention completely, and properly so.

Respondent offers this wholly inaccurate suggestion in order to make it seem as if petitioners claim the trial court's findings of fact were "clearly erroneous." This is not the case. There is no dispute over what the evidence is, nor over what that evidence shows; indeed, all the evidence is

admitted by both sides. The only dispute here is that dealt with and determined by both the majority and dissenting opinions below, namely, whether illegal discrimination against veterans exists where the undisputed evidence shows conclusively that respondent knew and intended to impose severe financial losses on veterans, and on them alone, for its own great financial benefit, or whether in addition the evidence must show that respondent had a subjective mental state of hostility toward veterans.

So that the Court may, if it thinks necessary, verify the foregoing statements, a copy of each side's brief in the Court of Appeals is filed with the Clerk. (This point is covered at pp. 23-29, 57, of the veterans' brief in the Court of Appeals; it is not mentioned in the corporation's brief.)

HARRY MONTGOMERY LEET,
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v.

GENERAL MOTORS CORPORATION
Respondent

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

After the petition herein was filed, this Court granted certiorari in a case under the Labor Management Relations Act (LMRA), 29 U.S.C. 150 et seq., which turns upon the same principle as the present case, *NLRB* v. *Erie Resistor Corp.*, no. 288, this term, certiorari granted October 8, 1962. In that case, the Board held that the employer's grant of superseniority to strikebreakers (replacements and strikers who abandoned the strike) was illegally discriminatory under section 8 (a) (3) of the Act because it inherently discouraged union membership regardless of the absence of any subjective motive to do so. The Third Circuit refused enforcement of the Board's order, on the ground that the employer's motive is the determining factor, and that in the absence of proof of an illegal motive, the obvious discrimination and inherent tendency to discourage union membership do not make the action illegal. 303 F.2d 359, 361-362. In another case on substantially the same facts, the Board again held the employer's conduct to be illegally discriminatory, and was sustained by the Sixth Circuit.

Swarco, Inc. v. *NLRB*, 303 F.2d 668, petition for certiorari pending, no. 335, this term.

The legal issue which the Court has concluded to review in *Erie Resistor* is exactly the same as that in the present case, namely, whether the statutory protection against discrimination is effective only where the employer has the subjective motive of perpetrating the discrimination. This similarity of legal issue is shown by the very recent decision of the Board, on authority of *Erie Resistor*, holding discriminatory under 8(a)(3) the employer's inclusion of strike time within the amount of unexcused absence which caused a forfeiture of profit-sharing benefits. *Quality Castings Company*, case no. 8-CA-2420, November 15, 1962, 51 LRRM 1422. This provision is in substance identical to GM's percentage-of-earnings device here, in that both provisions equate a statute-protected absence (strike time there, military service here) with other types of absence for purposes of reducing the benefit. The Board held that the statutory protection of the absence prohibited the employer from counting it with other absences to reduce or eliminate profit-sharing benefits. In addition (but disclaimed as a basis for the Board's conclusion), the employer changed the qualifying period for profit-sharing participation, to the detriment of the strikers, just as GM here changed its vacation pay provision for the single year in which such change could and did inflict grossly disproportionate losses on the returning veterans. The Board rested its decision in *Quality Castings* on its prior *Erie Resistor* decision.

Thus this Court's impending consideration of *Erie Resistor* will have a direct bearing on the issue in the present case. It is therefore appropriate that the same issue be considered under the veterans' reemployment statutes, by granting certiorari in this case. The interrelation of the facts of the two cases, and the essential identity of

the underlying legal issue refracted through surface differences in those facts, will illuminate the problem and assist in its proper determination, without adding appreciably to the burden of the Court. "Seniority" is involved in each case, since it was a shift from seniority as a basis for vacation pay which precipitated the action against GM. That *Eric Resistor* arises out of industrial strife does not differentiate it from the present case, for it is the very helplessness of the veterans because of their military absence, their inability to protect themselves by organizing strikes or otherwise, that make the reemployment statutes necessary.

The need for a subjective motive of intention to discriminate, what suffices to establish such motive, and whether other legitimate motives excuse the discrimination should, as a practical matter, be much the same under both statutes. But even if there is a substantial difference on this point between LMRA and the veterans' reemployment statutes, it is desirable in administering and applying them that this be known. In either event, the Court's impending consideration of this issue under LMRA, if joined with consideration of the same question under the veterans' reemployment statutes in this case, will present a rare occasion for particularly fruitful and exhaustive examination of the issue, which will inform and refine the Court's insight substantially more than if the veterans' reemployment case is excluded from consideration.

For this reason, it is appropriate that the denial of the petition for certiorari herein be reconsidered, and that the petition be granted.

HARRY MONTGOMERY LEE,
Washington, D. C.
Attorney for Petitioners

CERTIFICATE

I hereby certify that the foregoing petition is presented in good faith and not for delay, that it is restricted to the reason set forth in it which constitutes an intervening circumstance of substantial effect since the petition for certiorari was filed, and that a copy of this petition was mailed, first class postage prepaid, to Aloysius F. Power, attorney for respondent, 3044 W. Grand Boulevard, Detroit, Michigan, on December 28, 1962.

HARRY MONTGOMERY LEET

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v.

GENERAL MOTORS CORPORATION
Respondent

PETITION FOR REHEARING OF ORDERS DENYING CERTIORARI

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OCTOBER TERM, 1962

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GENERAL MOTORS CORPORATION,
Respondent

PETITION FOR REHEARING OF ORDERS DENYING CERTIORARI

Petitioners pray that this Court grant rehearing of its orders of December 3, 1962 and January 14, 1963, denying the petition for certiorari and rehearing, 371 U. S. 925, 965, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled cause as prayed for in the petition filed September 27, 1962, herein.

Reason for Granting Rehearing and Issuing the Writ

At the time of the Court's orders of December 3, 1962 and January 14, 1963, the Court had not decided *NLRB v. Erie Resistor Corp.*, 31 Law Week 4407, (May 13, 1963); Appendix, infra. In that case, the same in principle as the present one, the Court has now determined that an employer's grant of super-seniority to strikebreakers constituted discrimination against the union under the National Labor Relations Act, even though there was no specific

evidence of any subjective intent on the part of the employer to discriminate, and even though the employer asserted a legitimate business purpose—to keep the plant operating—for its action. Because of "the inherently discriminatory or destructive nature of the conduct itself," the employer "must be held to intend the very consequences which foreseeably and inescapably flow from his actions . . ." And despite an accompanying business reason for the action, "his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership, and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended." 31 Law Week at 4409; Appendix 7a-8a (Court's emphasis).

The decision in the present case is diametrically opposed to this rule, in holding that GM was entitled to profit itself greatly by eliminating practically all of the veterans' vacation pay, even though GM *concededly knew* (said the Circuit) of the discriminatory consequences it was visiting upon the veterans (Petition, App. 35). The Court of Appeals here permitted the employer to retain its profits from discrimination by merely denying that in taking the veterans' vacation pay it had any motive of hostility to them, though the objective circumstances (the discriminatory effects, the resulting profit to GM, and GM's knowledge that both would occur) were unanimous to the contrary. In so holding, the Court of Appeals expressly rejected the test of intent established by *Erie Resistor*. (Petition, App. 36-37).

Erie Resistor is but the latest example of what Mr. Justice Holmes found to be the necessary and certain movement of the law away from consideration of the individual's subjective morality, his malevolence or lack of it in doing an act, and by "experience . . . continually working

out concrete rules, which in form are still more external and still more remote from a reference to the moral condition of the defendant, than even the test of the prudent man . . .", and "[i]t does this in the domain of wrongs described as intentional, as systematically as in those styled unintentional or negligent" *Common Law* (1943 ed.) p. 162, 163; see also p. 38, 60, 64, 65, 75, 107, 133-134.

Recognizing that this test would require judgment for petitioners, the court below refused to apply it on the ground that the discrimination here is governed by the veterans' reemployment statutes rather than the NLRA.

Under both statutes, however, the employees' protection is a statutory creation, it is directed to similar ends for similar reasons, and the Congressional solicitude for the fair treatment of returning veterans is certainly as great as it is for fair treatment of union membership.[1]

That the standard of what constitutes discrimination is the same under both statutes is plain because the super-seniority held discriminatory in *Erie Resistor* is the same super-seniority held not conferred on the veterans by the reemployment statutes in *Fishgold* v. *Sullivan Drydock* &

[1] The Court's granting of certiorari in two veterans' reemployment cases, *Brooks* v. *Missouri Pacific R. Co.* and *Tilton* v. *Missouri Pacific R. Co.*, 372 U. S. 904, 905 (February 18, 1963) since the denial of the petition herein shows the continuing importance and viability of the protection of the veterans' reemployment statutes. These two cases also illustrate the fact that protecting the veterans against discrimination is but the other face of the "escalator" rule; for part of the problem both there and here is the extent to which a veteran may be penalized because of his inability on account of military absence to perform a requirement of work at a particular time, and to what extent the reemployment statutes excuse him from it.

Tilton and Brooks completed the work required for promotion at a later date (after military service) than the union agreement specified for the seniority they claimed, and they demand that their seniority be established as of the date they would have completed the work but for their military service. Alvado and most of the other veterans here actually completed the work requirement in the combined years of their departure for and return from military service (that is, considering their employment as continuous without interruption for military service, and "tacking" these years together, they have actually worked substantially a full year) and got little or no vacation pay in either year (Pet. 6, 17). The veterans contend, of course, that this is one phase of the discrimination against them, and one reason why the "percent of earnings" requirement is invalid as to them.

Repair Corp., 348 U. S. 275, for substantially the same reasons in both cases. In *Fishgold*, the reason was the importance of the seniority-system, and the fact that "'Congress recognized in the Act the existence of seniority systems'" and "'sought to preserve . . . rights under these systems'" and "within [their] framework" (328 U. S. at 288), just as in *Erie Resistor* the reason was the importance of the seniority system and the disruptive effects on it of super-seniority (31 Law Week at 4409-4410); Appendix (9a-10a).

An attitude of hostility to veterans, unlike a hostile attitude toward unions, will never be openly expressed, and to require specific proof of it renders ineffectual the statute's protection against discrimination. The reemployment statutes, like the NLRA, are concerned with foreseeable discriminatory consequences and effects rather than with emotional attitudes. If the employer knowingly inflicts a major financial loss on veterans alone because of their military absence and thereby achieves a large monetary gain for himself, his bare protestation that in accomplishing this he was not hostile to the veterans can hardly defeat the statutory ban on discrimination—yet it did so here.

For these reasons, specific proof of malevolence is plainly no more necessary to proving discrimination under the veterans' reemployment statutes than under NLRA.[2] *Erie*

[2] Balancing or weighing the competing "business purpose" against the discriminatory consequences of the employer's conduct has no place here. Decisions under the reemployment statutes, unlike the *Mackay* case (304 U.S. 333) which caused the "balancing" discussion in *Erie Resistor* (App. 11a), have not permitted any degree of discrimination against veterans on account of their military absence. Even if "balancing" were proper, there is no independent or competing purpose here which might be weighed against the untoward effects of the discrimination, for GM's business purpose, to settle the strike favorably, is but the other side of its discrimination, a mere redescription of the same act; GM simply took money from the veterans and pocketed it, instead of discriminating against them in an effort to avoid an adverse impact from a separate quarter as in the cases in note 8 of *Erie Resistor*, App. 8a. It will be noted that where two separate purposes exist, which one is dominant is determined by which objective effects (and not which emotional attitudes) are dominant, for the things balanced, said the Court, are the "intended consequences upon employee rights" and the "business ends served by the employer's conduct." (App. 8a).

Resistor has set forth the controlling principle, which the majority below expressly rejected (Pet. app., 36-37).

Conclusion

Rehearing of the Court's prior orders denying the petition for certiorari should be granted, and the petition should be granted.

Respectfully submitted,

SHELDON E. BERNSTEIN
Attorney for Petitioners

Certificate

I hereby certify that the foregoing petition is presented in good faith and not for delay, and that it is restricted to the ground set forth therein which constitutes an intervening circumstance of substantial effect since the Court's prior orders were entered.

SHELDON E. BERNSTEIN

APPENDIX

NLRB v. *Erie Resistor Corp.*

No. 288, October Term, 1962

Opinion of the Court, May 13, 1963

31 Law Week 4407

Mr. Justice White delivered the opinion of the Court.

The question before us is whether an employer commits an unfair labor practice under § 8 (a)[1] of the National Labor Relations Act, 61 Stat. 136, 29 U. S. C. § 151, when he extends a 20-year seniority credit to strike replacements and strikers who leave the strike and return to work. The Court of Appeals for the Third Circuit in this case joined the Ninth Circuit, *Labor Board* v. *Potlatch Forests, Inc.*, 189 F.2d 82 (and see *Labor Board* v. *Lewin-Mathes*, 285 F.2d 329, from the Seventh Circuit), to hold that such super-seniority awards are not unlawful absent a showing of an illegal motive on the part of the employer. 303 F.2d 359. The Sixth Circuit, *Swarco, Inc.*, v. *Labor Board*, 302 F. 2d 668, and the National Labor Relations Board are of the opinion that such conduct can be unlawful even when the employer asserts that these additional benefits are necessary to continue his operations during a strike. To resolve these conflicting views upon an important question in the administration of the National Labor Relations Act, we brought the case here. 371 U. S. 810.

Erie Resistor Corporation and Local 613 of the International Union of Electrical, Radio and Machine Workers were bound by a collective bargaining agreement which

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1 "SEC. 8 (a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)."

was due to expire on March 31, 1959. In January 1959, both parties met to negotiate new terms but, after extensive bargaining, they were unable to reach agreement. Upon expiration of the contract, the union, in support of its contract demands, called a strike which was joined by all of the 478 employees in the unit.[2]

The company, under intense competition and subject to insistent demands from its customers to maintain deliveries, decided to continue production operations. Transferring clerks, engineers and other nonunit employees to production jobs, the company managed to keep production at about 15% to 30% of normal during the month of April. On May 3, however, the company notified the union members that it intended to begin hiring replacements and that strikers would retain their jobs until replaced. The plant was located in an area classified by the United States Department of Labor as one of severe unemployment and the company had in fact received applications for employment as early as a week or two after the strike began.

Replacements were told that they would not be laid off or discharged at the end of the strike. To implement that assurance, particularly in view of the 450 employees already laid off on March 31, the company notified the union that it intended to accord the replacements some form of super-seniority. At regular bargaining sessions between the company and union, the union made it clear that, in its view, no matter what form the super-seniority plan might take, it would necessarily work an illegal discrimination against the strikers. As negotiations advanced on other issues, it became evident that super-seniority was fast becoming the focal point of disagreement. On May

[2] In addition to these employees, 450 employees in the unit were on layoff status.

28, the company informed the union that it had decided to award "20 years"[3] additional seniority both to replacements and to strikers who returned to work, which would be available only for credit against future layoffs and which could not be used for other employee benefits based on years of service. The strikers, at a union meeting the next day, unanimously resolved to continue striking now in protest against the proposed plan as well.

The company made its first official announcement of the super-seniority plan on June 10, and by June 14, 34 new employees, 47 employees recalled from layoff status and 23 returning strikers had accepted production jobs. The union, now under great pressure, offered to give up some of its contract demands if the company would abandon super-seniority or go to arbitration on the question, but the company refused. In the following week, 64 strikers returned to work and 21 replacements took jobs, bringing the total to 102 replacements and recalled workers and 87 returned strikers. When the number of returning strikers went up to 125 during the following week, the union capitulated. A new labor agreement on the remaining economic issues was executed on July 17, and an accompanying settlement agreement was signed providing that the company's replacement and job assurance policy should be resolved by the National Labor Relations Board and the federal courts but was to remain in effect pending final disposition.

Following the strike's termination, the company reinstated those strikers whose jobs had not been filled (all but 129 were returned to their jobs). At about the same

[3] The figure of 20 years was developed from a projection, on the basis of expected orders, of what the company's work force would be following the strike. As of March 31, the beginning of the strike, a male employee needed seven years' seniority to avoid layoff and a female employee nine years.

time, the union received some 173 resignations from membership. By September of 1959, the production unit work force had reached a high of 442 employees but by May of 1960, the work force had gradually slipped back to 240. Many employees laid off during this cutback period were reinstated strikers whose seniority was insufficient to retain their jobs as a consequence of the company's super-seniority policy.

The union filed a charge with the National Labor Relations Board alleging that awarding super-seniority during the course of the strike constituted an unfair labor practice and that the subsequent layoff of the recalled strikers pursuant to such a plan was unlawful. The Trial Examiner found that the policy was promulgated for legitimate economic reasons,[4] not for illegal or discriminatory purposes, and recommended that the union's complaint be dismissed. The Board could not agree with the Trial Examiner's conclusion that specific evidence of subjective intent to discriminate against the union was necessary to finding that super-seniority granted during a strike is an unfair labor practice. Its consistent view, the Board said, had always been that super-seniority, in circumstances such as these, was an unfair labor practice. The Board rejected the argument that super-seniority granted during a strike is a legitimate corollary of the employer's right of replacement under *Labor Board* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, and detailed at some length the

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[4] The Examiner had relied upon the company's employment records for his conclusion that the replacement program was ineffective until the the announcement of the super-seniority awards. The General Counsel, to show that such a plan was not necessary for that purpose, pointed to the facts that the company had 300 unprocessed job applications when the strike ended, that the company declared to the union that it could have replaced all the strikers and that the company did not communicate its otherwise well-publicized policy to replacements before they were hired but only after they accepted jobs.

factors which to it indicated that "super seniority is a form of discrimination extending far beyond the employer's right of replacement sanctioned by *Mackay*, and is, moreover, in direct conflict with the express provisions of the Act prohibiting discrimination." Having put aside *Mackay*, the Board went on to deny "that specific evidence of respondent's discriminatory motivation is required to establish the alleged violations of the Act," relying upon *Radio Officers Union* v. *Labor Board*, 347 U. S. 17, *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793, and *Teamsters Local* v. *Labor Board*, 365 U. S. 667. Moreover, in the Board's judgment, the employer's insistence that its overriding purpose in granting super-seniority was to keep its plant open and that business necessity justified its conduct was unacceptable since "to excuse such conduct would greatly diminish, if not destroy, the right to strike guaranteed by the Act, and would run directly counter to the guarantees of §§ 8 (a) (1) and (3) that employees shall not be discriminated against for engaging in protected concerted activities."[5] Accordingly, the Board declined to make findings as to the specific motivation of the plan or its business necessity in the circumstances here.

The Court of Appeals rejected as unsupportable the rationale of the Board that a preferential seniority policy is illegal however motivated.

> "We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the

[5] In addition, the Board held that continued insistence on this or a similar proposal as a condition to negotiating an agreement constituted a refusal to bargain in good faith under § 8 (a) (5). See *Labor Board* v. *Wooster Division of Borg-Warner*, 356 U.S. 342.

The Board also concluded that on May 29, when the union voted to continue striking in protest against the super-seniority plan, the strike was converted into an unfair labor practice strike. All strikers not replaced at that date, the Board held, were entitled to reinstatement as of the date of their unconditional abandonment of the strike regardless of replacements. See *Labor Board* v. *Pecheur Lozenge Co.*, 209 F.2d 393.

concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted solely to protect and continue the business of the employer. We find nothing in the Act which proscribes such policy. Whether the policy adopted by the company in the instant case was illegally motivated, we do not decide. The question is one of fact for the decision of the Board." 303 F. 2d, at 364.

It consequently denied the Board's petition for enforcement and remanded the case for further findings.

We think the Court of Appeals erred in holding that, in the absence of a finding of specific illegal intent, a legitimate business purpose is always a defense to an unfair labor practice charge. Cases in this Court dealing with unfair labor practices have recognized the relevance and importance of showing the employer's intent or motive to discriminate or to interfere with union rights. But specific evidence of such subjective intent is "not an indispensable element of proof of violation." *Radio Officers* v. *Labor Board*, 347 U. S. 17, 44. "Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference . . . The existence of discrimination may at times be inferred by the Board, for 'it is permissible to draw on experience in factual inquiries.' " *Teamsters Local* v. *Labor Board*, 365 U. S. 667, 675.

Though the intent necessary for an unfair labor practice may be shown in different ways, proving it in one manner may have far different weight and far different consequences than proving it in another. When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions

which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices. *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46 (discharging employees); *Associated Press* v. *Labor Board*, 301 U. S. 103, 132 (discharging employees); *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177 (hiring employees). Compare *Labor Board* v. *Brown Paukin Co.*, 287 F.2d 17, with *Labor Board* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848 (subcontracting union work); and *Fiss Corp.*, 43 N.L.R.B. 125, with *Jacob H. Klotz*, 13 N. L. R. B. 746 (movement of plant to another town). Such proof itself is normally sufficient to destroy the employer's claim of a legitimate business purpose, if one is made, and provides strong support to a finding that there is interference with union rights or that union membership will be discouraged. Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach upon protected rights. The employer's claim of legitimacy is totally dispelled.[6]

The outcome may well be the same when intent is founded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out. *Radio Officers* v. *Labor Board*, *supra*. But, as often happens, the

[6] Accordingly, those cases holding unlawful a "super-seniority" plan prompted by a desire on the part of the employer to penalize or discriminate against striking employees, *Ballas Egg Producers* v. *Labor Board*, 283 F.2d 871; *Labor Board* v. *California Date Growers Assn.*, 259 F.2d 587; *Olin Mathieson Chem. Corp.* v. *Labor Board*, 232 F.2d 158, aff'd *per curiam*, 352 U.S. 1020, are explainable without reaching the considerations present here.

employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless, his conduct *does* speak for itself— it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court,[7] of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.[8] This essenti-

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[7] See, *e.g.*, *Labor Board* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333; *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793; *Labor Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105; *Labor Board* v. *Truck Drivers Union*, 353 U. S. 87.

[8] In a variety of situations, the lower courts have dealt with and rejected the approach urged here that conduct otherwise unlawful is automatically excused upon a showing that it was motivated by business exigencies. Thus, it has been held that an employer cannot justify the discriminatory discharge of union members upon the ground that such conduct is the only way to induce a rival union to remove a picket line and permit the resumption of business, *Labor Board* v. *Star Publishing Co.*, 97 F. 2d 465, or rearrange the bargaining unit because of an expected adverse effect on production, *Allis Chalmers Mfg. Co.* v. *Labor Board*, 162 F. 2d 435, or defend a refusal to bargain in good faith on the ground that unless the employer's view prevails dire consequences to the business will follow, *Labor Board* v. *Harris*, 200 F. 2d 656, or refuse exclusive recognition to a union for fear that such recognition will bring reprisals from rival unions, *McQuay-Norris Mfg. Co.* v. *Labor Board*, 116 F. 2d 748, cert. denied, 313 U.S. 565; *Labor Board* v. *National Broadcasting Co.*, 150 F. 2d 895, or discriminate in his business operations against employees of rival unions or without union affiliation solely in order to keep peace in the plant and avoid disruption of business, *Wilson & Co., Inc.*, v. *Labor Board*, 123 F. 2d 411; *Labor Board* v. *Hudson Motor Car Co.*, 128 F. 2d

ally is the teaching of the Court's prior cases dealing with this problem and, in our view, the Board did not depart from it.

The Board made a detailed assessment of super-seniority and, to its experienced eye, such a plan had the following characteristics:

(1) Super-seniority affects the tenure of all strikers whereas permanent replacement, proper under *Mackay*, affects only those who are, in actuality, replaced. It is one thing to say that a striker is subject to loss of his job at the strike's end but quite another to hold that in addition to the threat of replacement, all strikers will at best return to their jobs with seniority inferior to that of the replacements and of those who left the strike.

(2) A super-seniority award necessarily operates to the detriment of those who participated in the strike as compared to nonstrikers.

(3) Super-seniority made available to striking bargaining unit employees as well as to new employees is in effect offering individual benefits to the strikers to induce them to abandon the strike.

(4) Extending the benefits of super-seniority to striking bargaining unit employees as well as to new replacements deals a crippling blow to the strike effort. At one stroke, those with low seniority have the opportunity to obtain the job security which

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528; *Labor Board* v. *Gluek Brewing Co.*, 144 F. 2d 847; *Labor Board* v. *Oertel Brewing Co.*, 197 F. 2d 59; *Labor Board* v. *McCatron*, 216 F. 2d 212, cert. denied, 348 U.S. 943; *Labor Board* v. *Richards*, 265 F.2d 855. See also *Idaho Potato Growers* v. *Labor Board*, 144 F. 2d 295; *Cusano* v. *Labor Board*, 190 F. 2d 898; *Labor Board* v. *Industrial Cotton Mills*, 208 F.2d 87, cert. denied, 347 U. S. 935. Indeed, many employers doubtless could conscientiously assert that their unfair labor practices were not malicious but were prompted by their best judgment as to the interests of their business. Such good-faith motive itself, however, has not been deemed an absolute defense to an unfair labor practice charge.

ordinarily only long years of service can bring, while conversely, the accumulated seniority of older employees is seriously diluted. This combination of threat and promise could be expected to undermine the strikers' mutual interest and place the entire strike effort in jeopardy. The history of this strike and its virtual collapse following the announcement of the plan emphasize the grave repercussions of super-seniority.

(5) Super-seniority renders future bargaining difficult, if not impossible, for the collective bargaining representative. Unlike the replacement granted in *Mackay* which ceases to be an issue once the strike is over, the plan here creates a cleavage in the plant continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is re-emphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general.

In the light of this analysis, super-seniority by its very terms operates to discriminate between strikers and non-strikers, both during and after a strike, and its destructive impact upon the strike and union activity cannot be doubted. The origin of the plan, as respondent insists, may have been to keep production going and it may have been necessary to offer super-seniority to attract replacements and induce union members to leave the strike. But if this is true, accomplishment of respondent's business purpose inexorably was contingent upon attracting sufficient replacements and strikers by offering preferential inducements to those who worked as opposed to those who

struck. We think the Board was entitled to treat this case as involving conduct which carried its own indicia of intent and which is barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion of union rights. The Board concluded that the business purpose asserted was insufficient to insulate the super-seniority plan from the reach of § 8 (a) (1) and § 8 (a) (3), and we turn now to a review of that conclusion.

The Court of Appeals and respondent rely upon *Mackay* as precluding the result reached by the Board but we are not persuaded. Under the decision in that case an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers. It may be as the Court of Appeals said that "such a replacement policy is obviously discriminatory and may tend to discourage union membership." But *Mackay* did not deal with super-seniority, with its effects upon all strikers, whether replaced or not, or with its powerful impact upon a strike itself. Because the employer's interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers does not mean it also outweighs the far greater encroachment resulting from super-seniority in addition to permanent replacement.

We have no intention of questioning the continuing vitality of the *Mackay* rule but we are not prepared to extend it to the situation we have here. To do so would require us to set aside the Board's considered judgment that the Act and its underlying policy require, in the present context, giving more weight to the harm wrought including discouraging participation in concerted activities by super-seniority, than to the interest of the employer in operating its plant during the strike by utilizing this particu-

lar means of attracting replacements. We find nothing in the Act or its legislative history to indicate that superseniority is necessarily an acceptable method of resisting the economic impact of a strike nor do we find anything inconsistent with the result which the Board reached. On the contrary, these sources are wholly consistent with, and lend full support to, the conclusion of the Board.

Section 7[9] guarantees, and § 8 (a)(1) protects from employer interference, the rights of employees to engage in concerted activities which, as Congress has indicated, H. R. Rep. No. 245, 80th Cong., 1st Sess. 26, includes the right to strike. Under § 8 (a) (3), it is unlawful for an employer by discrimination in terms of employment to discourage "membership in any labor organization," which *Radio Officers* v. *Labor Board*, 347 U. S. 17, 39-40, such as a legitimate strike. [Sic] *Labor Board* v. *Wheeling Pipe Line, Inc.*, 229 F.2d 391; *Republic Steel Corp.* v. *Labor Board*, 114 F.2d 820. Section 13[10] makes clear that although the strike weapon is not an unqualified right, nothing in the Act except as specifically provided is to be construed to interfere with this means of redress, H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 59, and § 2 (3)[11] preserves to strikers their unfilled positions and status as

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[9] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

[10] "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

[11] "The term 'employee' . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . ."

employees during the pendency of a strike. S. Rep. No. 573, 74th Cong., 1st Sess. 6.[12] This repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.[13]

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[12] This concern for the maintenance of the status prevailing before the strike has had its most recent manifestation in the 1959 amendments to the National Labor Relations Act. Congress there withdrew the ban inserted by the Taft-Hartley amendment disqualifying replaced strikers from voting in union elections. Now, employees not entitled to reinstatement can, under regulations promulgated by the Board, exercise their pre-strike voting rights. See § 9 (c) (3); S. Rep. No. 187, 86th Cong., 1st Sess. 32-33.

[13] "Labor unions . . . were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor, of economic value, to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court. The strike became a lawful instrument in a lawful economic struggle, or competition, between employer and employees as to the share or division between them of the joint product of labor and capital."

American Steel Foundries v. *Tri-City Council*, 257 U. S. 184, 209, quoted in Staff of Senate Committee on Education and Labor, 74th Cong., 1st Sess., Comparison of S. 2926 (73d Cong.) and S. 1958 (74th Cong.) 20. See also, Remarks of Senator Wagner before Senate Committee on Education and Labor, 73d Cong., 2d Sess., Hearings on S. 2926, 10-11:

> "It has been urged that the bill places a premium on discord by declaring that none of its provisions shall impair the right to strike. On the contrary, nothing would do more to alienate employee cooperation and to promote unrest than a law which did not make it clear that employees could refrain from working if that should become their only redress;"

Remarks of Senator Taft, 93 Cong. Rec. 3835 (1947):

> "That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right . . . We have considered the question whether the right to strike can be

While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant. Thus when Congress chose to qualify the use of the strike, it did so by prescribing the limits and conditions of the abridgment in exacting detail, *e.g.*, §§ 8 (b) (4), 8 (d), by indicating the precise procedures to be followed in effecting the interference, *e.g.*, § 10 (j), (k), (1); §§ 206-210, Labor Management Relations Act, and by preserving the positive command of § 13 that the right to strike is to be given a generous interpretation within the scope of the labor act. The courts have likewise repeatedly recognized and effectuated the strong interest of federal labor policy in the legitimate use of the strike. *Automobile Workers* v. *O'Brien*, 339 U.S. 454; *Amalgamated Assn. of Elec. Ry. Employees* v. *Wisconsin Employment Rel. Bd.*, 349 U.S. 383; *Labor Board* v. *Remington Rand, Inc.*, 130 F.2d 919; *Cusano* v. *Labor Board*, 190 F. 2d 898; cf. *Sinclair Ref. Co.* v. *Atkinson*, 370 U. S. 195.

Accordingly, in view of the deference paid the strike weapon by the federal labor laws and the devastating consequences upon it which the Board found was and would be precipitated by respondent's inherently discriminatory super-seniority plan, we cannot say the Board erred in the balance which it struck here. Although the Board's decisions are by no means immune from attack in the courts as cases in this Court amply illustrate, *e.g.*, *Labor Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105; *Labor Board* v. *United Steelworkers*, 357 U.S. 357; *Labor Board*

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modified. I think it can be modified in cases which do not involve the basic question of wages, prices, and working conditions. . . . So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation."

v. *Insurance Agents*, 361 U.S. 477, its findings here are supported by substantial evidence, *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, its explication is not inadequate, irrational or arbitrary, compare *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 196-197; *Labor Board* v. *United Steelworkers*, *supra*, and it did not exceed its powers or venture into an area barred by the statute. Compare *Labor Board* v. *Insurance Agents*, *supra*. The matter before the Board lay well within the mainstream of its duties. It was attempting to deal with an issue which Congress had placed in its hands and "where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer." *Labor Board* v. *Insurance Agents*, *supra*, at 499. Here as in other cases, we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life, *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793, 798; *Phelps-Dodge Corp.* v. *Labor Board*, *supra*, at 194, and of "[appraising] carefully the interest of both sides of any labor-management controversy in the diverse circumstances of particular cases" from its special understanding of "the actualities of industrial relations." *Labor Board* v. *United Steelworkers*, *supra*, at 362-363. "The ultimate problem is the balancing of conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 96.

Consequently, because the Board's judgment was that the claimed business purpose would not outweigh the necessary harm to employee rights—a judgment which we sustain—it could properly put aside evidence of respon-

dent's motive and decline to find whether the conduct was or was not prompted by the claimed business purpose. We reverse the judgment of the Court of Appeals and remand the case to that court since its review was a limited one and it must now reach the remaining questions before it, including the propriety of the remedy which at least in part turns upon the Board's construction of the settlement agreement as being no barrier to an award not only of reinstatement but of back pay as well.[14]

Reversed and remanded.

Mr. Justice Harlan, concurring.

I agree with the Court that the Board's conclusions respecting this 20-year "superseniority" plan were justified without inquiry into the respondents' motives. However, I do not think that the same thing would necessarily be true in all circumstances, as for example with a plan providing for a much shorter period of extra seniority. Being unsure whether the Court intends to hold that the Board has power to outlaw *all* such plans, irrespective of the employer's motives and other circumstances, or only to sustain its action in the particular circumstances of *this* case, I concur in the judgment.

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[14] "We do not agree with Respondent's contention that the Union in its strike settlement agreement of July 17 waived all rights for these employees. The settlement agreement provided, *inter alia*: 'The Company's replacement and job assurance policy to be resolved by the NLRB and the Federal Courts and to remain in effect pending final disposition.' It is clear that this agreement was intended merely as an interim settlement pending legal determination of the employees' rights. In any event, we would not in our discretion honor a private settlement which purported to deny to employees the rights guaranteed them by the Act. Cf. *Wooster Division of Borg-Warner Corp.*, 121 NLRB 1492, 1495." *Erie Resistor Corp.*, 132 NLRB 621, 631 n. 31.